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In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE,
PETITIONER

v.

ADAN LOPEZ-MENDOZA and
ELIAS SANDOVAL-SANCHEZ

**PETITION FOR A WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

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QUESTION PRESENTED

Whether the Fourth Amendment's exclusionary rule should be extended to civil deportation proceedings to suppress an illegal alien's admissions of unlawful presence in this country, thereby allowing him to perpetuate his unlawful conduct.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

The Solicitor General, on behalf of the Immigration and Naturalization Service, petitions for a writ of certiorari to review the judgments of the United States Court of Appeals for the Ninth Circuit in these consolidated cases.

OPINIONS BELOW

The opinion of the court of appeals (App. A, *infra*, 1a-94a) is reported at 705 F.2d 1059. The opinions of the Board of Immigration Appeals and the immigration judges (Apps. D-H, *infra*, 97a-116a) are not reported.

JURISDICTION

The judgments of the court of appeals (Apps. B and C, *infra*, 95a and 96a) were entered on April 25, 1983. On July 15, 1983, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including September 22, 1983. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

Respondents Lopez-Mendoza and Sandoval-Sanchez sought to avoid deportation on the ground that their admissions of illegal alienage, which were used against them at their deportation hearings, were the fruits of unlawful arrests and should have been suppressed. On petitions for review of their deportation orders (consolidated by the court of appeals (see App. A, *infra*, 2a)), the Ninth Circuit held, in a seven to four decision,¹ that the exclusionary rule applies in deportation proceedings. Because it concluded that Sandoval had been arrested in violation of the Fourth Amendment and that the only evidence supporting his deportability was obtained as a result of the unlawful arrest, the court of appeals suppressed that evidence and reversed Sandoval's order of deportation. The legality of Lopez's arrest had not been determined in the administrative deportation proceedings, and thus the court vacated the deportation order against Lopez and remanded his case to the Board of Immigration Appeals for determination of the Fourth Amendment issue.

¹ The court decided *sua sponte* to hear the cases before an en banc panel. See Rule 25 of the Rules of the United States Court of Appeals for the Ninth Circuit.

1. Lopez was arrested in 1976 at his place of employment by Immigration and Naturalization Service ("INS") investigators. The investigators had received a tip about the employment of illegal aliens (L.A.R. 34),² and they went to the location, which appeared to be a transmission repair shop (L.A.R. 36, 89-90), for the purpose of interviewing the persons named by the informant (L.A.R. 34). They arrived shortly before 8.00 a.m. (L.A.R. 81-82). One agent approached the proprietor and stated the purpose of their visit (L.A.R. 37-38, 84-85). The proprietor would not allow his employees to be interviewed during working hours, and he suggested that the agents return during the lunch hour (L.A.R. 59). The agents knew from past experience, however, that if they left and returned later, there would be no illegal aliens remaining (*ibid*).

To avoid a confrontation with the proprietor, one agent approached Lopez, who was standing some distance away (L.A.R. 44). The agent first identified himself in English but received no response. The agent then identified himself in Spanish, inquired where Lopez was from, how he had entered the United States, whether he had papers, and whether he had any family in this country (L.A.R. 40). Lopez answered the questions voluntarily (L.A.R. 61). Had he refused to answer, the agent simply would have terminated the interview (L.A.R. 61, 71-72). Lopez's answers disclosed that he was an undocumented alien with no family ties in this country (L.A.R. 40, 49). Because of his lack of family ties and the consequent risk of his absconding, Lopez was taken into custody

² "L.A.R." refers to the administrative record in *Lopez-Mendoza*; "S.A.R." refers to the administrative record in *Sandoval-Sanchez*.

as an illegal alien (L.A.R. 49-50). Subsequently, Lopez executed an affidavit admitting his Mexican nationality and illegal entry into this country (L.A.R. 136-137).

Based on Lopez's admissions, the immigration judge found him deportable (App. D, *infra*, 97a-99a). The immigration judge found it unnecessary to pass upon Lopez's claim that he had been unlawfully arrested, stating that "the mere fact of an illegal arrest has no bearing on subsequent deportation proceedings" (*id.* at 98a).

The Board of Immigration Appeals ("BIA") dismissed Lopez's appeal (App. E, *infra*, 100a-103a). Like the immigration judge, the BIA concluded that Lopez's claim that he had been illegally arrested was irrelevant (*id.* at 102a):

We reject the notion that an unlawful arrest can somehow transform an alien's unlawful presence in the United States into a right to remain.

The BIA also rejected Lopez's claim for invocation of the exclusionary rule, noting (App. E, *infra*, 102a-103a) that it had thoroughly considered that issue in a prior case (*Matter of Sandoval*, 17 I. & N. Dec. 70 (1979)) and had there concluded that:

[A]doption of the rule in deportation proceedings would [not] offer any significant deterrent to misconduct to an immigration officer who would otherwise intentionally violate an individual's Fourth Amendment rights in the hope of assisting in that alien's deportation. * * * [T]he potential benefit of the rule does not justify the societal cost of its application and * * * other means of deterring immigration officers from unlawful conduct are available.

2. Sandoval was apprehended in 1977 at his place of employment, a potato processing plant.³ INS Agent Bower and other officers went to the plant, with the permission of its personnel manager, to check for illegal aliens (S.A.R. 39-40). While some of the officers stationed themselves at the exits, Bower and a uniformed Border Patrol agent entered the plant. Because a shift change was occurring, they went first to the lunchroom, then through the plant area, and finally to the main entrance (S.A.R. 40-43). As soon as they entered the lunchroom, they identified themselves as immigration officers (S.A.R. 46). Their appearance caused confusion—many people in the lunchroom rose and either headed for the exits or milled around, people in the plant area left their equipment and started running, and many of those who were entering the plant turned around and started walking back out (S.A.R. 42).

The two officers eventually stationed themselves at the main entrance to the plant (S.A.R. 47). As the employees passed, the officers looked for those who averted their heads, avoided eye contact, or tried to hide themselves in a group. They addressed these individuals in English, with innocuous questions. The conversations were terminated if the individuals responded in English. Those who could not respond in English and who by their actions aroused Agent Bower's suspicion, based on his experience as an immigration investigator, were questioned in Spanish as to their right to be in the United States (S.A.R. 48, 54-55).

³ Respondent Sandoval is not the same individual as was involved in *Matter of Sandoval, supra*, in which the Board of Immigration Appeals held the exclusionary rule ordinarily inapplicable to deportation proceedings.

Agent Bower testified that it was "very probable" that he himself rather than his partner had stopped and questioned Sandoval at the plant, but that he could not be "absolutely positive" (S.A.R. 49-50). The alien whom he thought he remembered as Sandoval was "very evasive"—the individual had averted his head, turned around and walked away when he saw Agent Bower (S.A.R. 52-53). Agent Bower was certain that no employee was questioned about his status unless his actions had given the officers reason to believe that the employee was an undocumented alien (S.A.R. 55).

Including Sandoval, 37 illegal aliens were briefly detained at the plant (S.A.R. 41) and later transported to the county jail for processing (S.A.R. 44). At the jail, about one-third of the aliens agreed to accept voluntary departure, and they were immediately put on a bus to Mexico (S.A.R. 56). Those, including Sandoval, who elected to fight deportation were questioned further; during this questioning Sandoval's admission of unlawful entry was reduced to writing by Agent Bower (S.A.R. 56, 58; App. A, *infra*, 6a).

Based on the written record of Sandoval's admission, the immigration judge found him deportable (App. F, *infra*, 104a-109a). The immigration judge considered and rejected Sandoval's claim that he had been unlawfully arrested (*id.* at 107a) and, in the alternative, held that an illegal arrest "does not tend to negate the validity of a deportation hearing" (*id.* at 108a).

The BIA dismissed Sandoval's appeal (App. G, *infra*, 110a-113a). Upon reviewing the entire record, including Sandoval's own testimony, the BIA concluded that the circumstances of his arrest had not

affected his recorded admission (*id.* at 112a). The BIA also again declined to invoke the exclusionary rule (*id.* at 112a-113a).

3. The court of appeals reversed Sandoval's deportation order and vacated and remanded Lopez's deportation order. Six members of the panel, in an opinion written by Judge Norris, held that Sandoval's admission was the fruit of an unlawful arrest and that the exclusionary rule, which was held applicable to deportation proceedings, required suppression of the evidence (App. A, *infra*, 1a-37a). Judge Goodwin, in a special concurring opinion (*id.* at 38a), agreed that, "for better or for worse," the exclusionary rule applies to deportation proceedings, but noted that he joined in the finding of a Fourth Amendment violation only "[u]nder the compulsion of *Intern. Ladies' Garment Workers', Etc. v. Sureck*, 681 F.2d 624 (9th Cir. 1982), which is the law of this circuit, but with which [he] disagreed * * *." Lopez's de-

* Citing *International Ladies Garment Workers Union v. Sureck*, 681 F.2d 624, 634-643 (9th Cir. 1982), cert. granted *sub nom. INS v. Delgado*, No. 82-1271 (Apr. 25, 1983), and noting that "Officer Bower could not remember Sandoval or describe his behavior" (App. A, *infra*, 7a), the majority questioned whether there was "the requisite individualized suspicion of illegal alienage to justify even a brief *Terry* stop of Sandoval" (*ibid.*). Nevertheless, the majority did not decide that issue, concluding instead that "the dispositive question is * * * the lawfulness of [Sandoval's] detention at the time he was interrogated at the jail" (*ibid.*). The court held that by the time of Sandoval's interrogation at the police station, "the initial stop had clearly ripened into an arrest" (*ibid.*) and that the "furtive behavior" observed by Officer Bower (which the court treated as the only basis for the officer's decision to detain Sandoval) constituted insufficient probable cause to support an arrest (*id.* at 8a).

In his special concurring opinion, Judge Goodwin noted simply that he did "not believe that a 'Terry Stop' in a work place

portation order was vacated and his case remanded to the BIA to determine whether there had been a Fourth Amendment violation.

Adopting the analytical framework set forth in *United States v. Janis*, 428 U.S. 433 (1976), the majority concluded that the benefits of applying the exclusionary rule in civil deportation proceedings outweighed the costs. On the "benefit" side, the majority opined that the "deterrent impact of invoking the rule in deportation proceedings will be 'substantial and efficient'" (App. A, *infra*, 25a (footnote omitted), quoting *United States v. Janis*, *supra*, 428 U.S. at 453) because the allegedly illegal evidence is used by the same agency whose officers obtain it and because "there are no other applications of the exclusionary rule which effectively deter the offending officers from violating the Fourth Amendment"—for example, reliance on the deterrence that could be obtained by suppressing evidence only in criminal immigration prosecutions was thought to be inadequate because the evidence was not likely to have been obtained with such criminal prosecutions in mind. App. A, *infra*, 22a-24a. The majority also rejected *Bivens* actions,

where the immigration officers have a right to be necessarily ripens into an unlawful seizure on the facts of this case" (App. A, *infra*, 38a).

In a special dissenting opinion, Judge Poole argued that probable cause was established when, after being questioned in Spanish, the suspected aliens "answered and conceded alienage and also illegal entry" (App. A, *infra*, 92a). Judge Poole also noted that the "record as a whole shows that all of the persons to whom questions were addressed first in English and then in Spanish had exhibited some behavior which preceded the questioning," that Sandoval "was among those asked in Spanish whether 'they had papers'" and that "[h]e had none" (*ibid.*).

injunctive relief, and internal agency discipline, finding them inadequate alternatives to application of the exclusionary rule (App. A, *infra*, 33a-35a).

On the other side of the balance, the majority found the societal costs of suppression to be negligible. It opined that the only real cost to be considered was the number of illegal aliens who will successfully avoid deportation and concluded that that number "will not appreciably increase the number of illegal aliens in our midst" (App. A, *infra*, 27a).

Judge Alarcon, joined by Judges Wright, Wallace and Poole, dissented from the majority's holding on the exclusionary rule issue (App. A, *infra*, 39a-85a). Judge Wright also wrote a separate opinion specially concurring in the principal dissenting opinion (*id.* at 86a-90a), and, as previously noted (see page 8 note 4, *supra*), Judge Poole separately dissented from the majority's conclusion that Sandoval had been unlawfully arrested (App. A, *infra*, 91a-94a).

On the exclusionary rule issue, the principal dissent argued that there was nothing in the record "from which it can be reasonably inferred that immigration officers routinely conduct unreasonable searches and seizures," nor were there "any facts that would support an inference that extending the exclusionary rule to civil deportation proceedings would act as a significant deterrent to present INS practices" (App. A, *infra*, 46a). Hence, the dissent was of the view that the court had "created a remedy for which there is no demonstrated need" (*ibid.*).⁵ Judge Wright, in his

⁵ The dissent also accused the majority of reaching "out beyond the record" because "neither appellant timely moved to suppress evidence on fourth amendment grounds" (App. A, *infra*, 45a). The majority held, however, that respondents' motions to "terminate" their deportation proceedings should

separate dissent, was willing to assume that there might "be a deterrent effect if the rule were applied in deportation proceedings because these proceedings are within immigration officers' zone of primary interest" (*id.* at 87a). After noting the costs associated with the exclusionary rule, however, he expressed the view that "[t]hese are not cases in which the manner of seizing evidence was so egregious as to call for the deterrent impact of the rule" (*id.* at 89a).

On the cost side, the principal dissent noted that, under the "fruit of the poisonous tree" concept, suppression could well immunize an alien perpetually from deportation despite his continuing violation of the immigration laws (App. A, *infra*, 48a-49a). Moreover, requiring suppression hearings in deportation proceedings "could result in protracted interruption of the proceedings, and may seriously impede enforcement of our nation's immigration laws" (*id.* at 72a). Thus, the dissent took issue with the majority's decision to limit its consideration of the costs of applying the exclusionary rule in deportation proceedings to the additional number of illegal aliens that might be expected to escape deportation (*id.* at 74a-75a):

The impact of the rule on deportation proceedings is not so much that the illegal alien population will increase—indeed it does so every year despite heightened enforcement policies. Rather, the impact of the rule on civil deportation proceedings must be measured against the number of motions to suppress that will be made—not

be treated as motions to suppress (*id.* at 2a-3a n.1). We do not seek review of the majority's conclusion that respondents made at least the functional equivalent of suppression motions in these cases.

the number of constitutional challenges that are meritorious. This is the potential injury to the deportation proceeding that must be weighed in the balancing process.

The dissent then concluded that this cost would be excessive (App. A, *infra*, 77a). Finally, the dissent was of the view that INS's stringent procedures for disciplining officers who conduct illegal searches and seizures made application of the exclusionary rule to deportation proceedings unnecessary (*id.* at 78a-82a).

REASONS FOR GRANTING THE PETITION

By extending the exclusionary rule to civil deportation proceedings, convened solely for the purpose of determining whether an alien has the right to be in the United States, the court of appeals has sanctioned a continuing violation of the law by freeing an illegal alien and allowing him to perpetuate his unlawful presence in this country. This licensing of continuing unlawful conduct is unparalleled in our jurisprudence, for although the suppression of evidence in a criminal prosecution often amounts to a grant of immunity for past criminal conduct, so too does the expiration of a statute of limitations, the granting of a pardon, or the granting of immunity by a prosecutor. But it is unprecedented for the judiciary to create rules of evidence or procedure that directly facilitate the commission of continuing unlawful conduct.

The reversal of Sandoval's deportation order, moreover, does more than simply offend society's notions of justice and judicial integrity. The court of appeals' extension of the exclusionary rule to civil deportation proceedings will have severe practical effects: It threatens mortal injury to the enforcement of our immigration laws and may create a new class of

aliens whose only documentation is a judge's opinion suppressing evidence—and it does so at a time when the Legislative and Executive Branches are attempting to regain control over the nation's borders and stem the flood of illegal aliens unlawfully entering and residing in the United States.

The suppression rule, after all, is not constitutionally mandated, but is a judicially created remedy designed to deter unlawful police conduct. See, *e.g.*, *United States v. Calandra*, 414 U.S. 338, 347-348 (1974). The determinative question, therefore, is not whether the protections of the Fourth Amendment extend to deportable aliens discovered in this country—a proposition we do not contest—but whether it is appropriate to permit illegal aliens to invoke the exclusionary rule in civil deportation proceedings in order to perpetuate their unlawful presence in the United States.

In *United States v. Janis*, this Court made it clear that determination of whether and under what circumstances the exclusionary rule is to be applied requires a cost-benefit analysis (428 U.S. at 454). Although the court below employed such an inquiry, the majority went wrong in the values it brought to its analysis. As Judge Alarcon's dissenting opinion makes clear (App. A, *infra*, 39a-85a), the majority totally ignored many of the costs of suppression in the deportation context, took a grudging view of the single cost it did consider, and greatly overstated the need for the incremental deterrence that its decision might promote. Accordingly, this Court, which has never applied the exclusionary rule "to exclude evidence from a civil proceeding, federal or state," *United States v. Janis*, *supra*, 428 U.S. at 447 (footnote omitted), should review the Ninth Circuit's creation of a new "barrier[]" to law enforcement in the

pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches" (*id.* at 459).

1. The exclusionary rule was developed in the context of criminal prosecutions to safeguard Fourth Amendment rights. Under the rule, first announced by this Court in *Weeks v. United States*, 232 U.S. 383 (1914), evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure. See also *Mapp v. Ohio*, 367 U.S. 643 (1961). But the rule is not constitutionally mandated; instead, it "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, *supra*, 414 U.S. at 348 (footnote omitted); see also *United States v. Janis*, *supra*, 428 U.S. at 446; *Stone v. Powell*, 428 U.S. 465, 486 (1976); *United States v. Peltier*, 422 U.S. 531, 538 (1975). Accordingly, the exclusionary rule "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Stone v. Powell*, *supra*, 428 U.S. at 486. Instead, application of the rule has been carefully "restricted to those areas where its remedial objectives are thought most efficaciously served." *United States v. Calandra*, *supra*, 414 U.S. at 348; see also *United States v. Janis*, *supra*, 428 U.S. at 447; *United States v. Peltier*, *supra*, 422 U.S. at 538-539. For these reasons, the Court has long engaged in a cost-benefit analysis when it has confronted suggested expansions of the rule.*

* See Brief for the United States at 34-38, *United States v. Leon*, No. 82-1771 (filed Sept. 15, 1983). We are furnishing respondents' counsel with copies of that brief.

In *Janis* the Court declined to apply the exclusionary rule to bar the use in a federal civil tax proceeding of evidence seized by state law enforcement officials in violation of the Fourth Amendment. Recognizing deterrence as the underlying purpose of the exclusionary rule, the Court compared the costs resulting from application of the rule in the circumstances there presented with the deterrent benefit that could be anticipated and concluded that the expected benefit did not outweigh the societal costs imposed by suppression (428 U.S. at 454). In the instant case as well, balancing the potential harm resulting from excluding evidence of alienage against the benefit to Fourth Amendment values of applying the exclusionary principle reveals that the rule should not have been extended to civil deportation proceedings.

2. The societal costs resulting from extension of the exclusionary rule to deportation proceedings are far greater than the court of appeals was willing to acknowledge. The most obvious result of applying the exclusionary rule in deportation proceedings is that an alien who is not entitled to be in this country may nonetheless remain here indefinitely.⁷ The effect

⁷ The court of appeals' suggestion that this is not a serious cost, because illegal aliens may not be threatening individually or criminally dangerous (App. A, *infra*, 31a), is mistaken. Collectively, illegal aliens pose a substantial economic threat to this country and to the citizens and lawful resident aliens against whom they compete for employment. See, e.g., *De Canas v. Bica*, 424 U.S. 351, 356-357 (1976) ("Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens * * *"); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-879 (1975)

may be a de facto judicial grant of permanent resident status and immunity from the immigration laws.⁸ In contrast, although exclusion of evidence in a criminal proceeding may allow an accused to escape punishment for past crimes, it does not countenance continuation of the illegal conduct in the future.

An even more far-reaching cost is the damage to the immigration litigation system and, consequently, to this country's ability to expel the vast numbers of illegal aliens who have entered surreptitiously, which will result from merely permitting suppression motions to be brought. The problem was detailed by the Board of Immigration Appeals in *Matter of Sandoval*, *supra*, 17 I. & N. Dec. at 80 (footnote omitted):

Absent the applicability of the exclusionary rule, questions relating to deportability routinely involve simple factual allegations and matters of proof. When Fourth Amendment issues are raised at deportation hearings, the result is a

("[T]hese [illegal] aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services.").

⁸ Contrary to the lower court's facile suggestion that aliens who successfully invoke the exclusionary rule can be reapprehended and deported by the use of untainted evidence (App. A, *infra*, 32a n.21), the matter is not that simple. Unlike the situation with respect to aliens who overstay their visas, INS has no records concerning the vast majority of deportable aliens—those who have entered without inspection (see *id.* at 28a). Once they are discharged from a deportation proceeding, they may never be apprehended again. And even if they are, it may well be impossible to prove that the new evidence of their deportability is not tainted by the evidence that has previously been suppressed. Thus, under the decision below, the practical effect of a suppression order may well be to immunize an illegal alien from ever being deported.

diversion of attention from the main issues which those proceedings were created to resolve, both in terms of the expertise of the administrative decision makers and of the structure of the forum to accommodate inquiries into search and seizure questions. The result frequently seems to be a long, confused record in which the issues are not clearly defined and in which there is voluminous testimony, but the underlying facts [are] not sufficiently developed. The ensuing delays and inordinate amount of time spent on such cases at all levels has an adverse impact on the effective administration of the immigration laws, which to date (in view of the virtual absence of cases in which evidence has been ultimately excluded) has in no way been counter-balanced by any apparent productive result.^[9]

⁹ The court of appeals stated that, prior to the BIA's decision in *Matter of Sandoval*, *supra*, "INS performed its investigative and prosecutorial functions in a legal regime in which the exclusionary rule was thought to apply" (App. A, *infra*, 14a). However, in *Matter of Sandoval*, *supra*, 17 I. & N. Dec. at 75 n.7, the BIA explained that "it ha[d] not previously intended to reach the issue decided today and withdraws from any language which may be read as suggesting otherwise." The BIA also noted that there were few judicial decisions addressing the issue and none that had engaged in "a detailed analysis of the relative merits of excluding such evidence from deportation proceedings" (*id.* at 75). Thus, the BIA determined to give the issue fresh consideration (*ibid.*):

Accordingly, as the Board has not previously resolved this issue, as we find only one contemporary Federal Court decision in which unlawfully seized evidence is specifically held to be excludable, and as we find no decision in which the appropriateness of applying the rule in deportation proceedings is analyzed in any detail, we will address the question as one of first impression.

The single federal court decision referred to by the BIA is *Wong Chung Che v. INS*, 565 F.2d 166 (1st Cir. 1977). There,

And, referring to the realities of immigration practice, the BIA noted (17 I. & N. Dec. at 80) :

This is particularly true in a proceeding where delay may be the only "defense" available and where problems already exist with the use of dilatory tactics.

Deportation hearings are conducted before a quasi-judicial administrative forum of special and limited function and expertise. The proceedings are—and are intended to be—essentially summary. See *Zakonaite v. Wolf*, 226 U.S. 272, 275 (1912). Indeed, given the volume of deportation proceedings, most cannot be anything but summary if the system is to continue to operate.¹⁰ The staggering workload is manageable

without analysis, the court held that the exclusionary rule should be applied in a deportation proceeding to suppress *physical* evidence obtained as a result of an illegal arrest. The court suggested, however, that it would not follow the same rule in the case of oral statements (565 F.2d at 168-169).

¹⁰ According to the Office of the Chief Immigration Judge, from March 1983 (the first month for which statistics are available) until July, the 55 authorized immigration judges received 37,653 deportation cases and completed adjudication of 25,563; received 3,162 exclusion cases and completed adjudication of 2,418; and received 1,005 motions to reopen and completed adjudication of 920. Projections for fiscal year 1983 are 92,643 deportation cases received and 62,523 adjudicated; 7,620 exclusion cases received and 5,886 adjudicated; and 2,484 motions to reopen received and 2,241 adjudicated. This will amount to 70,650 completed adjudications for the year, or 5.35 adjudications *per day* per immigration judge. By way of contrast, 6,023 criminal defendants were actually tried in United States District Courts during fiscal year 1982 (*Annual Report of the Director of the Administrative Office of the United States Courts* 141 (1982)) by 484 district judges (*id.* at 34). This averages out to 12.44 criminal trials *per year* per judge.

only because, as the BIA explained in *Matter of Sandoval, supra*, 17 I. & N. Dec. at 80 n.21, "in the majority of cases, deportability is conceded and the bulk of the hearing concerns applications for various categories of mandatory and discretionary relief from deportation." Manifestly, any significant intrusion of "complex constitutional controversies" (App. A, *infra*, 75a) will overload the system to the point of breakdown.

Moreover, it is unrealistic to expect that there will not be a significant increase in the number of suppression motions made in deportation proceedings if the decision below stands. For an illegal alien, "delay may be the only 'defense' available." *Matter of Sandoval, supra*, 17 I. & N. Dec. at 80. The longer an alien can postpone a final deportation order, the longer he can remain in this country and hope that something will happen to save him from deportation. A suppression motion, with the complex constitutional and factual issues it may present, obviously offers a significant opportunity for delay.¹¹ In addition, it can confidently be predicted that the immigration bar will respond to recent efforts by the Executive Branch to strengthen enforcement of the immigration laws by more forcefully asserting Fourth Amendment claims in suppression motions.

It is thus safe to predict that if the decision below is allowed to stand, suppression motions in deportation proceedings will become as common and routine as they presently are in criminal cases¹² and that, as

¹¹ Respondents were arrested on August 3, 1976 (Lopez), and June 23, 1977 (Sandoval), and both are still in this country because of their Fourth Amendment claims. L.A.R. 135; S.A.R. 81.

¹² One-third of all federal criminal defendants going to trial file Fourth Amendment suppression motions, and 70% to 90%

the dissent suggests (App. A, *infra*, 72a-73a), a considerable number of aliens who have hitherto waived hearings and accepted voluntary departure will now assert their right to a hearing solely in order to file such motions.¹³

There is yet another cost of applying the exclusionary rule to deportation proceedings, one whose impact upon enforcement of the immigration laws could well dwarf all other costs, substantial as they are. As noted below, immigration officers make over one million apprehensions a year. In light of the huge number of arrests that an individual officer makes in one day and the inevitable time lag between the arrest and a deportation proceeding, his recollection of the circumstances of a particular arrest, and

of these involve formal hearings. Comp. Gen. Rep. No. GGD-79-45, *Impact of the Exclusionary Rule on Federal Criminal Prosecutions* 10 (1979). Although most of these motions are denied (*ibid.*), the effect on judicial and prosecutorial resources is the same as if the motions were meritorious. There is no reason to expect illegal aliens to be substantially more reticent about filing nonmeritorious suppression motions than criminal defendants.

¹³ As an indication of the universe from which additional assertions of the right to a hearing may come, immigration investigators and the Border Patrol apprehended 1,093,396 illegal aliens in fiscal year 1982. The projected figures for 1983 and 1984 are 1,210,000 and 1,221,000 apprehensions, respectively (Executive Office of the President, Office of Management and Budget, *Budget of the United States Government—Fiscal Year 1984: Appendix* (H. Doc. No. 98-4, 98th Cong., 1st Sess.) I-N16 (1983)). Even at the rate of 5.35 adjudications per immigration judge per day, only 70,650 adjudications will be completed in fiscal year 1983 (see page 17 note 10, *supra*). Thus, the ability of the system to function obviously depends on the fact that only a small fraction of apprehended illegal aliens exercise their right to a hearing.

even of a particular group of arrests on a single day, will understandably fade with time. If probable cause for a particular arrest or reasonable suspicion for a stop is to be made an issue in deportation proceedings, INS will find it necessary as a matter of litigative precaution to require its officers to compile detailed, contemporaneous, written reports recording the circumstances of each individual arrest.¹⁴ Even if it be assumed that substantial numbers of illegal aliens will continue to depart voluntarily without a hearing, INS agents still would have to make individualized arrest records because they could not know in advance *which* aliens would exercise their right to a hearing. Manifestly, the time consumed in executing detailed on-the-spot arrest reports will drastically reduce the number of arrests that can be made. As we demonstrate below, this diversion of INS's limited investigative resources cannot be justified.

3. Even in the criminal context for which the exclusionary rule was first devised, this Court has noted the lack of reliable empirical evidence to support the proposition that the exclusionary rule operates effectively to deter police misconduct. See, *e.g.*, *Stone v. Powell*, *supra*, 428 U.S. at 492 & n.32; *United States v. Janis*, *supra*, 428 U.S. at 449-453; *Elkins v. United States*, 364 U.S. 206, 218 (1960); *Irvine v. California*, 347 U.S. 128, 136 (1954). Nevertheless, just as

¹⁴ Although we do not seek this Court's review of the court of appeals' Fourth Amendment ruling in Sandoval's case, it is worth noting how much emphasis the court placed on the fact that Agent Bower could not be "absolutely positive" (S.A.R. 50) that he himself had questioned Sandoval (see App. A, *infra*, 5a-7a). There is of course a considerable difference between an actual absence of probable cause to arrest (which we do not concede in these cases) and an agent's inability to recall the exact circumstances of any particular arrest. See pages 22-24, *infra*.

the Court has accepted as intuitively plausible the premise that suppression in a criminal trial is likely to some extent or in some circumstances to deter police officers from committing Fourth Amendment violations, we are willing to assume that application of the exclusionary rule in deportation proceedings could to some extent deter immigration officers from committing like violations. Where the court of appeals went astray, however, was in its invocation of the rule in the absence of any demonstrated need for such a severe measure. While we do not contend that the civil nature of a deportation proceeding is necessarily controlling, the fact remains that this Court has never extended the rule to civil cases. See *United States v. Janis*, *supra*, 428 U.S. at 447. Instead, the Court has recognized that "the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." *United States v. Calandra*, *supra*, 414 U.S. at 348 (footnote omitted); see also *Abel v. United States*, 362 U.S. 217, 237 (1960).¹⁵ In the instant case, the court it-

¹⁵ Although the exclusionary rule has been invoked to exclude illegally seized evidence in a forfeiture proceeding, the Court was careful to note that the object of a forfeiture proceeding, like a criminal proceeding, "is to penalize for the commission of an offense against the law." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965). In contrast, the purpose of a deportation proceeding is to determine an alien's right to remain in this country. Deportation is "not a punishment for crime," but rather "a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has deter-

self acknowledged (App. A, *infra*, 28a) that there is no evidence of widespread Fourth Amendment violations by immigration officers, and yet it reached out to apply the exclusionary rule to all deportation proceedings in the future. This rush to judgment, in the absence of convincing evidence of need, cannot be squared with the much more cautious approach taken by this Court to suggested expansions of the scope of the exclusionary rule.

The absence of a demonstrated need to invoke the exclusionary rule is particularly striking here, where it is not at all clear that any Fourth Amendment violation actually occurred. As noted by Judge Poole in dissent (App. A, *infra*, 92a), the record in Sandoval's case, fairly read, reveals that the only aliens transported to the police station were those who admitted their unlawful alienage at the plant. If Agent Bower had been able to testify that he specifically recalled Sandoval's having made such an admission, clearly there would have been probable cause to arrest (see page 20 note 14, *supra*). Application of the exclusionary rule to a case like the present one, therefore, is not likely to "deter" official misconduct, since it appears that none in fact occurred. Instead, the result will be limited to the imposition of burdensome record-keeping requirements that will severely interfere with effective enforcement of the immigration laws (see pages 19-20, *supra*). Thus, even conceding the validity in general of the deterrence rationale

mined that his continuing to reside here shall depend." *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893); see also *Mahler v. Eby*, 264 U.S. 32, 39 (1924) ("[D]eportation, while it may be burdensome and severe for the alien, is not a punishment."); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913); *Li Shing v. United States*, 180 U.S. 486, 494-495 (1901).

and its potential applicability to INS agents, the exclusionary rule is not likely to perform its expected function in the type of case here presented.

It is well to keep in mind in this connection the contrast between the practical circumstances surrounding the decision to stop or arrest and the legal rules governing adjudication of suppression motions. A majority of arrests of illegal aliens away from the border occur during farm, factory, or other workplace surveys. See, *e.g.*, Brief for the Petitioners at 3-4 & n.3, *INS v. Delgado*, No. 82-1271 (filed Aug. 10, 1983). (We are furnishing respondents' counsel with copies of our brief in *Delgado*.) As is evident from the record regarding the circumstances attending the arrest of respondent Sandoval, a single workplace survey can result in the apprehension of large numbers of illegal aliens, occurring under conditions that can only be described as chaotic. In order to safeguard the rights of individuals present at such surveys, some of whom may be citizens or lawfully present aliens, INS has developed various rules restricting stop, interrogation, and arrest practices. See, *e.g.*, *id.* at 7 n.7, 32-40 & n.25. There is no evidence that INS agents do not generally abide by these regulations, or, indeed, that they did not do so in these cases.

But when it comes time to conduct a suppression hearing, the burden is placed upon the government to prove as to each individual alien that the discovery of his or her illegal status was not preceded by an illegal stop or arrest. Given the often large number of illegal aliens arrested in the frequently chaotic circumstances surrounding a factory or farm survey, reconstruction of the particular observations that prompted the agents to detain or arrest each individual is indeed an awesome, if not impossible, task. The agents may

be able to testify that they follow the general rules—*e.g.*, that they do not arrest anyone unless there is an admission of illegal alienage or other strong evidence thereof—but plainly the Ninth Circuit, at least, is unwilling to rely upon such general testimony or upon any presumption of regularity to sustain the lawfulness of the stop or arrest.

The result of this combination of factual and legal circumstances—so different from the focused investigative activities usually under scrutiny in a suppression hearing related to a criminal prosecution—is that there will usually not in fact have been any Fourth Amendment violation attendant upon the securing of the admissions of illegal alienage upon which deportability frequently depends, yet it will often be impossible to prove this with the required degree of individualized specificity. Application of the exclusionary rule to deportation proceedings will thus result principally in the exclusion of *lawfully* obtained evidence. Under such circumstances, the deterrent potential of suppression is exceedingly difficult to achieve.

The court of appeals also failed to give adequate weight to the availability of less drastic deterrents: an administrative practice of excluding evidence seized through intentionally or flagrantly unlawful conduct,¹⁸

¹⁸ The Department of Justice requires that evidence seized through intentionally unlawful conduct be excluded, as a matter of policy, from the proceeding for which it was obtained. In addition, the BIA has held, subsequent to its decision in *Matter of Sandoval*, *supra*, that evidence will be excluded if the circumstances surrounding a particular arrest and interrogation would render admission of the evidence thereby obtained “fundamentally unfair” and in violation of “the fifth amendment’s due process requirement * * *.” *Matter of Toro*, 17 I. & N. Dec. 340, 343 (BIA 1980). Similarly, in *Matter of*

effective internal discipline,¹⁷ the availability of injunctive relief,¹⁸ and damages suits.¹⁹ Injunctive actions offer especially appropriate vehicles for correcting any institutional practices that might violate Fourth Amendment rights. Unlike the criminal field, in which there are hundreds of thousands of separate police forces, there is only one Immigration and Naturalization Service, and injunctive relief directed

Garcia, 17 I. & N. Dec. 319, 321 (BIA 1980), the Board suppressed an admission of alienage obtained after the alien's requests to speak to his attorney had been repeatedly refused and he had been held incommunicado for a significant period of time. Because the unlawfully obtained admission was the only evidence of deportability, the BIA ordered the deportation proceeding terminated (*ibid.*).

¹⁷ The principal dissenting opinion sets forth a detailed summary of INS's "comprehensive procedure" for investigating and punishing immigration officers who commit illegal searches and seizures (App. A, *infra*, 78a-81a). The majority dismissed these procedures, which it nevertheless described as "commendable," because it had "no evidence whatsoever that the guidelines are being consistently and effectively enforced" (*id.* at 35a). The majority's approach was backward—it should have ascertained that the disciplinary procedures are not being utilized before rejecting them as inadequate.

¹⁸ See, e.g., *International Ladies Garment Workers Union v. Sureck*, 681 F.2d 624 (9th Cir. 1982), cert. granted *sub nom.* *INS v. Delgado*, No. 82-1271 (Apr. 25, 1983).

¹⁹ See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971). We do not disagree with the majority's observation (App. A, *infra*, 33a) that illegal aliens, particularly if they have been deported, are unlikely to bring many *Bivens* suits. But the majority completely overlooked the fact that citizens or lawful aliens subjected to illegal searches or seizures can be expected to bring such actions, and the deterrence thereby gained would naturally extend to the future benefit of all persons.

against the Service will, if necessary, be effective. And, should individual INS agents violate Service policies protecting Fourth Amendment rights, the additional remedies of internal discipline and administrative suppression of evidence seized through intentionally unlawful conduct, supplemented by *Bivens* actions against individual INS agents, will have their corrective effect. With these deterrent mechanisms already available, any increased benefit to be derived from application of the exclusionary rule cannot justify the heavy costs previously described.

4. In sum, the societal costs of extending the exclusionary rule to deportation proceedings are enormous and plainly outweigh any incremental increase in deterrence of illegal conduct by enforcement officials. This country is in an immigration crisis, with, as the court of appeals noted, between 3½ and 12 million illegal aliens already here and over 500,000 more entering every year (see App. A, *infra*, 29a). The injection of complex constitutional questions into the immigration administrative hearing process, in which each immigration judge is currently making more than five adjudications *per day* (see page 17 note 10, *supra*), could bring an already dangerously overburdened system to a virtual halt. Extension of the exclusionary rule to civil deportation proceedings, the result of which could be to allow illegal aliens to perpetuate their presence in this country in violation of our immigration laws, thus seriously jeopardizes the Executive's ability to control illegal immigration.²⁰

²⁰ Moreover, appeals from denials of suppression motions in deportation proceedings may be expected to add greatly to the burdens of the courts of appeals, and ultimately of this Court.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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SEPTEMBER 1983

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APPENDIX A

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7673

ADAN LOPEZ-MENDOZA, PETITIONER-APPELLANT

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE

No. 80-7189

ELIAS SANDOVAL-SANCHEZ, PETITIONER-APPELLANT

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT-APPELLEE

[Filed Apr. 25, 1983]

Petition for Review of an Order of
the Board of Immigration Appeals

Argued and submitted en banc December 18, 1981

Before: BROWNING, Chief Judge, and WRIGHT, HUG,
GOODWIN, WALLACE, FLETCHER, ALARCON,
POOLE, CANBY, NORRIS, and REINHARDT,
Circuit Judges.

NORRIS, Circuit Judge:

These consolidated appeals present the question whether the exclusionary rule bars the Immigration and Naturalization Service (INS) from using in deportation proceedings evidence obtained by INS officers in violation of the Fourth Amendment. In separate proceedings, appellants were ordered deported under 8 U.S.C. § 1251(a)(2) on the basis of admissions to immigration officers that they were aliens in this country illegally. At their deportation hearings, both tried unsuccessfully to suppress evidence of their admissions on the ground they were the products of arrests made in violation of the Fourth Amendment.¹ The immigration judge in Sandoval's

¹ Sandoval and Lopez challenged at their respective deportation hearings the use of Form I-213 on the ground it was the product of an illegal arrest. Sandoval's attorney questioned the immigration officer at length about his authority, in the absence of a search warrant, to question the plant workers about the criteria he used to determine which workers to question regarding their immigration status and about Sandoval's responses to questions he was asked. All these questions were directed exclusively to the legality of Sandoval's arrest. The immigration judge participated in the questioning and in his order noted specifically that "[r]espondent is contending in regard to his denial of deportability that the evidence relied upon by the Government should be suppressed as it is the result of the 'fruit of the poisoned tree.' He stated that his arrest was unlawful, was without a warrant, and he was not advised of his Miranda rights." He went on to rule that because Sandoval's arrest was lawful, the information obtained from Sandoval was not tainted by any Fourth Amendment violation.

Lopez's counsel also argued vigorously that Lopez had been arrested illegally. Though styling his request as a motion to terminate the proceedings instead of a motion to suppress

case ruled the evidence admissible on the ground that Sandoval's detention did not violate the Fourth Amendment. The immigration judge in Lopez's case held that the exclusionary rule was inapplicable in deportation proceedings, making it unnecessary for him to decide whether Lopez had been unlawfully detained by immigration officers. The appeals of both Sandoval and Lopez from their respective deportation orders were dismissed by the Board of Immigration Appeals. Both appealed directly to this court. We have jurisdiction under 8 U.S.C. § 1105a (1976).

We reverse Sandoval's order of deportation because we hold that his detention by the immigration officers violated the Fourth Amendment, that the statements he made were a product of that unlawful detention, and that the exclusionary rule bars the INS from using, in deportation proceedings, evidence of statements it obtains illegally. Because the question whether Lopez's detention violated the Fourth Amendment was not adjudicated in his deportation hearing, we vacate his order of deportation and remand for further proceedings in light of our opinion today in *Sandoval*.

evidence, for all practical purposes the effect is the same. The only evidence introduced against Lopez was the INS Form I-213 and the affidavit of the immigration officer. Both were completed based on information obtained as a product of Lopez's arrest. The only reasonable way to interpret the motion to terminate is as one that includes both a motion to suppress and a motion to dismiss. The argument is that because Lopez's arrest violated the Fourth Amendment its fruits must be excluded, and because all the evidence introduced against Lopez was obtained as a product of his arrest there is no evidence on which to deport him. This appears to be how the BIA interpreted the motion.

I

On June 23, 1977, INS officers entered a potato processing plant in Pasco, Washington, where Sandoval worked, to search for illegal aliens. According to the testimony of the government's only witness, Officer Bower, the officers did not have a search warrant, but did have permission from company officials to question some of the company employees. Bower testified that several officers surrounded the plant to guard the exits while he and another officer conducted the investigation. The two officers, one of whom wore a Border Patrol uniform, first entered the company lunch room and identified themselves. This caused great confusion among company employees, with some "heading for the exits" and others remaining in the lunch room. When the officers entered the plant itself, more employees "headed for the exits, leaving their machines, and some of those coming in turned and started walking away." The officers then moved to the plant's main entrance where they stood during a shift change. There, they watched for workers "putting their heads down, turning their heads to the sides, avoiding eye contact, or trying to get into a tight group of people going through." Anyone passing through the gate who aroused suspicion in the minds of the officers was asked innocuous questions in English about such things as the weather or pay at the plant. Then, Bower testified, "[t]hose that couldn't answer in English, appeared to have a dumb look on their face, didn't know what was going on, and would almost start to move towards me as if they had known they were caught and the game was up, at that point, I would interrogate them in Spanish as to their right to be and remain in the United States."

When examined further about his criteria for stopping and questioning those entering and exiting the plant, Bower repeated that he had looked for "evasive movements, trying to be bunched up in groups, being right next to somebody, or trying to walk in parallel with somebody to avoid being spoken to" Eventually, he concluded, he questioned those at the plant "when it [came] to the point where I firmly believe that they are an illegal alien." He knew that point because, "[i]t is something each officer develops, some sooner than some others." After stopping a suspected illegal alien, the investigators would ask him whether he "had papers." Though Sandoval was stopped at the plant, Officer Bower testified that he had no specific recollection of Sandoval and that there was a "50-50 chance" that he had detained Sandoval and an equal chance that his partner had effected the detention. Bower thus did not know how Sandoval had responded to any questions he may have been asked or, indeed, whether he had responded at all.

"Because of the large number of people coming in and out of there," those initially stopped at the plant gate whom the officers wished to question further were detained in a men's restroom and clean-up area. There is no evidence in the record indicating whether Sandoval was questioned while in the men's room. Eventually, thirty-seven aliens who had been detained in the men's room, including Sandoval, were transported to the Franklin County Jail and processed in the training room of the Pasco Police Department. Once the suspects arrived at the jail, they were sorted into two groups. Those who wished to depart for Mexico voluntarily were processed immediately and placed on a bus leaving that day. Those who demanded a deportation hearing were detained and

processed later in the day. Sandoval was one of the latter group. During his processing, Sandoval was not orally advised of his rights but did read and refuse to sign Form I-274, a Spanish-English language form which explains the right to a deportation hearing and to counsel. Sandoval was then asked a series of questions regarding his immigration status. Based on the answers to these questions, Officer Bower completed INS Form I-213, indicating on the form that Sandoval was a native of Mexico and that he had entered the United States without inspection. The finding of alienage by the immigration law judge was based upon the Form I-213.²

In rejecting Sandoval's contention that he had been seized in violation of the Fourth Amendment, the immigration judge reasoned that Sandoval "could have at some time . . . reacted in a furtive manner in the presence of the officials" and that "[t]his plus foreign appearance would constitute enough articulable facts [to] give rise to a suspicion of alienage."³ Accordingly, the judge ruled that Sandoval's detention, first in the men's room of the processing plant and later at the Franklin County Jail, did not violate the Fourth Amendment. On appeal, the BIA held that Sandoval's

² In deportation proceedings involving unlawful entry into the country, the burden of proof is on the government to prove alienage. Once the government has met its burden, it is then up to the alien to prove his legal status in the United States. *Iran v. INS*, 656 F.2d 469, 471; 8 U.S.C. § 1361 (West Supp. 1982).

³ The immigration judge decided *Sandoval* before we held in *International Ladies Garment Workers Union v. Sureck*, 681 F.2d 624 (9th Cir. 1982) that an initial stop must be based on articulable facts giving rise to an individualized suspicion of illegal alienage, not simply alienage alone.

statements were voluntary and found "no basis to conclude upon review of the record as a whole . . . that the circumstances of the respondent's arrest affected the statements contained in the Form I-213." The Board did not address the question of the legality of Sandoval's arrest or the applicability of the exclusionary rule to his deportation proceeding.

On appeal to this court, Sandoval contends that because his statements were the product of an illegal arrest, the INS should be barred from using Form I-213 as evidence in his deportation proceeding. The government first argues that Sandoval's detention at the plant was at most an investigative stop and that the stop was lawful because the "officers' observations were sufficient to support a reasonable suspicion of the illegal nature of petitioner's alienage." Yet Officer Bower could not remember Sandoval or describe his behavior. It is thus difficult to imagine that there was the requisite individualized suspicion of illegal alienage to justify even a brief *Terry* stop of Sandoval. See *International Ladies Garment Workers Union v. Sureck*, 681 F.2d 624, 634-43 (9th Cir. 1982). Yet we need not decide that issue, for the dispositive question is not the lawfulness of the initial stop of Sandoval as he entered the plant, but the lawfulness of his detention at the time he was interrogated at the jail. It was there that Sandoval made the statements that were recorded by the INS agents on Form I-213 and used against him at his deportation hearing. By the time of the interrogation at the police station, the initial stop had clearly ripened into an arrest. See *Dunaway v. New York*, 442 U.S. 200, 212 (1979) (when a person is taken to a police station and placed in an interrogation room, the detention, "in contrast to the brief and narrowly circum-

scribed intrusion involved in [the *Terry* line of] cases . . . [is] in important respects indistinguishable from a traditional arrest" and must be supported by probable cause). It is clear that there was no probable cause for Sandoval's arrest. The furtive behavior attributed to the arrestees in Officer Bower's testimony—"turning their heads to the sides," "avoiding eye contact," not answering questions asked in English, having "a dumb look"—was patently insufficient as a matter of law to "warrant a man of reasonable caution in the belief," *Carroll v. United States*, 267 U.S. 132, 162 (1925), that they were aliens illegally in this country. To its credit, the government does not argue to the contrary.

In sum, we must conclude on the record before us that Sandoval was under arrest at the time he was interrogated at the Franklin County Jail, and that because his arrest was not based upon probable cause, it violated the Fourth Amendment.⁴ The statements

⁴ For purposes of review, we accept the historical facts as found by the immigration law judge. The question whether, on these facts, Sandoval's arrest was based upon probable cause, however, is one of law which is freely reviewable on appeal. See *United States v. Chesher*, 678 F.2d 1353, 1359 (9th Cir. 1982) (court of appeals makes own determination whether agreed facts are sufficient to provide probable cause for issuance of a warrant); *United States v. One Twin Engine Beech Airplane, etc.*, 533 F.2d 1106, 1109 (9th Cir. 1976) ("While we will defer to findings of basic facts, especially those depending on the credibility of witnesses and the subtleties of the evidence, we are required to review the determination of probable cause in a forfeiture proceeding as an application of a rule of law"). Since the applicability of the exclusionary rule when a violation of the Fourth Amendment has occurred is also a question of law, no purpose would be served by a remand to the immigration judge for a ruling on

obtained from Sandoval at the police station were thus the fruit of an illegal arrest.⁵ The exclusionary rule would, of course, bar the use of such oral statements in a criminal prosecution of Sandoval for violation of the immigration laws. *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975). See also *Brown v. Illinois*, 422 U.S. 590, 601-05 (oral statements made following illegal arrest suppressed; giving of *Miranda* warnings prior to statements did not, in itself, purge taint of illegal arrest). We now address the question whether that evidence—specifically, the Form I-213—is admissible in Sandoval's deportation hearing.⁶

II

The question of the applicability of the exclusionary rule in deportation proceedings is one of first impression in this Circuit. See *Cuevas-Ortega v. Immigration and Naturalization Service*, 588 F.2d 1274, 1278

this point. See *Brown v. Illinois*, 422 U.S. 590, 604 (1975) (record sufficient to enable reviewing court to determine for itself whether confession was voluntary; unnecessary to remand for further findings by lower court).

⁵ The government does not contend, and we do not believe, that Sandoval's statements at the police station were so distant from his arrest that they were sufficiently "an act of free will to purge the primary taint" of the illegal arrest. *Wong Sun v. United States*, 371 U.S. 471, 486 (1963). Sandoval made the statements within a brief time after his arrest and with no intervening period of freedom. The fact that some form of *Miranda* warnings may have been given Sandoval does not, standing alone, dissipate the taint of his illegal arrest. *Brown v. Illinois*, 422 U.S. 590, 602-03 (1975).

⁶ Unlike criminal prosecutions for violation of the immigration laws, deportation proceedings have historically been classified as civil in nature. See *Woodby v. Immigration and Naturalization Serv.*, 385 U.S. 276, 285 (1966).

(9th Cir. 1979) (question expressly reserved); *Hoon-silapa v. Immigration and Naturalization Service*, 586 F.2d 755 (9th Cir. 1978) (same). On the one occasion the Supreme Court has had to comment on the question, it stated in dictum that: "[i]t may be assumed that evidence obtained by the [Labor] Department through an illegal search and seizure cannot be the basis of a finding in deportation proceedings." *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923). Although this language has been read by the First Circuit, *Wong Chung Che v. Immigration and Naturalization Service*, 565 F.2d 166, 169 (1st Cir. 1977), and the commentators, see, e.g., Comment, *The Exclusionary Rule in Deportation Proceedings*, 14 Davis L. Rev. 955, 957 (1981) (hereinafter cited as *Exclusionary Rule Note*), as approving application of the exclusionary rule, it remains unclear to us whether the Court was expressing a view on the issue or simply assuming *arguendo* that the rule applies in deportation proceedings. We are thus hesitant to attach significant precedential weight to *Bilokumsky*.

The few federal courts which have squarely confronted the question have all held that evidence illegally obtained by federal agents is inadmissible in subsequent deportation proceedings. The first case to so hold was *United States v. Wong Quong Wong*, 94 F. 832 (D. Vt. 1899). Relying on *Boyd v. United States*, 116 U.S. 616 (1886) (evidence obtained in violation of the Fourth Amendment excluded from quasi-criminal forfeiture proceeding), the court in *Wong Quong Wong* reasoned that the "constitutional safeguards [of the Fourth Amendment] would be deprived of a large part of their value if they could be invoked only for preventing the obtaining of such

evidence, and not for protection against its use." *United States v. Wong Quong Wong*, 94 F. at 834. Some years later, in *Ex parte Jackson*, 263 F. 110, 112-13 (D. Mont.), *appeal dismissed*, 267 F. 1022 (9th Cir. 1920), the district court granted a writ of habeas corpus to an alien held for deportation, stating that "the deportation proceedings [were] unfair and invalid, in that they [were] based on evidence and procedure that violate the search and seizure and due process clauses of the Constitution."

In 1977, the First Circuit held in *Wong Chung Che v. Immigration and Naturalization Service*, 565 F.2d 166 (1st Cir. 1977) that evidence obtained in an illegal search by INS agents is inadmissible in a deportation proceeding. Although the court found the issue troublesome, it reasoned that "there is no authority of which we are aware that would make [the evidence admissible [and] [s]uch authority as we have found . . . assumes that it is inadmissible." *Id.* at 169. In making this determination, the First Circuit relied both on *Bilokumsky* and on the leading treatise on immigration law, which stated unequivocally that the rule does apply to deportation proceedings. 1A C. Gordon and H. Rosenfield, *Immigration Law and Procedure* § 5.2.c at 5-31 (rev. ed. 1980) ("[I]t is undisputed . . . that the Fourth Amendment prohibition against unreasonable searches and seizures applies in deportation proceedings and that evidence obtained as a result of an unlawful search cannot be used"); *see also* Fragomen, *Procedural Aspects of Illegal Search and Seizure in Deportation Cases*, 14 San Diego L. Rev. 151, 163 (1976) (now well established that exclusionary rule applies despite universal characterization of deportation as civil proceeding). The First Circuit also cited to other cases

in which it was assumed that the exclusionary rule applied in deportation proceedings. See *Wong Chung Che v. Immigration and Naturalization Service*, 565 F.2d at 169, citing *Illinois Migrant Council v. Pilliod*, 398 F. Supp. 882, 897-98 (N.D. Ill. 1975) (if this were deportation proceeding, rather than exclusion hearing, illegally obtained evidence would be suppressed). See also *Huerta-Cabrera v. Immigration and Naturalization Service*, 466 F.2d 759, 761 n.5 (7th Cir. 1972) (stating that illegal arrest *per se* does not invalidate deportation proceeding but that "[t]his would not be a case of the use of evidence seized during the course of an illegal arrest."); *Yam Sang Kwai v. Immigration and Naturalization Service*, 411 F.2d 683, 690 (D.C. Cir. 1969) (Wright, J., dissenting) ("[I]n my view the statement was the fruit of an [illegal] seizure . . . , and should not have been admitted"). But see *Hoonsilapa v. Immigration and Naturalization Service*, 586 F.2d 755 (9th Cir. 1978) (reserving the question).⁷

⁷ Several courts have, in addition, considered objections to the use in deportation proceedings of evidence allegedly obtained in violation of the Fourth Amendment, but have found no violation. See, e.g., *Cordon de Ruano v. INS*, 554 F.2d 944, 945-6 (9th Cir. 1977). See also *Matter of Sandoval*, *supra*, at 36, (app. to dissent) and Note, *The Exclusionary Rule in Deportation Proceedings: A Time for Alternatives*, 14 J. Int'l Law & Econ., 349, 363 (1980), for lists of cases considering objections to evidence. The fact that these courts found it necessary to decide whether evidence had been seized in violation of the Fourth Amendment may suggest that they assumed the exclusionary rule would apply if a violation were found. Although such cases may not be disregarded as precedent, see generally *Mitchum v. Foster*, 407 U.S. 225, 231 (1972), we recognize that these courts may simply have chosen to consider the Fourth Amendment issue first and,

Until 1979, in fact, the INS itself had assumed in "countless cases since . . . *U.S. ex. rel. Bilokumsky v. Tod*, 263 U.S. 149, 155," that the rule was applicable. *Matter of Sandoval*, 17 I & N Dec. 70, 93 (Appelmen, Bd. member, dissenting). See also *In re Tsang*, 14 I&N Dec. 1, 2 (BIA 1973) (rule concerning motions to suppress "which is applied in criminal cases, has been adopted for use in deportation hearings"). It was not until 1979, two years after Sandoval's arrest, that the BIA^{*} for the first time held, in a case unrelated to this one, that the exclusionary rule does *not* bar the INS from using in deportation hearings evidence obtained by INS agents. *Matter of Sandoval*, 17 I & N Dec. 70, 93 (1979) (BIA 1979). In sanctioning the use of evidence seized by INS agents during an illegal search of an alien's home, the BIA cut against the grain of its own historic practice and the views of every court and commentator to have considered the issue.

In sum, while the question whether the exclusionary rule applies in deportation proceedings is one of first

having found no violation, declined to reach the exclusionary rule issue. See the debate in *Tirado v. Commissioner*, 689 F.2d 307 (2d Cir. 1982) between Judge Newman, writing for the majority, *id.* at 309 n.2, and Judge Oakes concurring, *id.* at 315, on the order in which the issues of Fourth Amendment violation and application of the exclusionary rule should be considered.

^{*} After an alien suspected of being in the country illegally is apprehended, he is brought before an immigration law judge who conducts his deportation hearing. 8 U.S.C. § 1252 (b). The Board of Immigration Appeals hears appeals from decisions of the immigration law judges. 8 C.F.R. § 3.1(b). The BIA is an agency of the Department of Justice that is separate from the Immigration and Naturalization Service. 8 C.F.R. § 3.1.

impression in the Ninth Circuit, we do not write on a slate that is entirely clean. With the exception of the BIA, the authorities have uniformly favored exclusion of evidence obtained illegally by INS agents. It is also significant that before the BIA's decision in *Matter of Sandoval*, the INS performed its investigative and prosecutorial functions in a legal regime in which the exclusionary rule was thought to apply. Notwithstanding this prior history, we believe the question merits fresh consideration, especially in light of *United States v. Janis*, 428 U.S. 433 (1976), the only case in which the Supreme Court has squarely addressed the applicability of the exclusionary rule to civil proceedings. Because deportation proceedings are deemed to be civil in nature, *Woodby v. Immigration and Naturalization Service*, 385 U.S. 276, 285 (1966), we look to the Court's analysis in *Janis* for guidance in determining whether to apply the rule here.⁹

⁹ It is, of course, settled law that the exclusionary rule applies in criminal, *Weeks v. United States*, 232 U.S. 383 (1914); *Mapp v. Ohio*, 367 U.S. 643 (1961); *Elkins v. United States*, 364 U.S. 206 (1960), and quasi-criminal, *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), proceedings.

Although we do not decide the case on this ground, we believe it is arguable that application of the exclusionary rule to deportation proceedings could be justified by characterizing such proceedings as quasi-criminal, applying the rationale of *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965). A deportation proceeding closely resembles the quasi-criminal forfeiture proceeding that was the subject of that case. Deportation is a severe sanction in itself (although "deportation is not technically a criminal proceeding, it visits a great hardship on the individual and deprives him of the right to stay and live and work in this land of freedom. That deportation is a penalty—at times a most severe one—cannot be

III

In *United States v. Janis*, the Supreme Court held that the exclusionary rule did not bar the federal government from using in a civil tax proceeding evidence seized by state law enforcement officers in violation of the Fourth Amendment. 428 U.S. at 459-60. In deciding *Janis*, the Court employed an analysis that does not foreclose application of the exclusionary rule in all civil proceedings.¹⁰ Rather, while noting that it

doubted," *Bridges v. Wixon*, 326 U.S. 135, 154 (1945)) and is certainly more serious a penalty than that usually imposed in criminal prosecutions for violation of the immigration laws. *Matter of Sandoval*, 17 I & N Dec. at 96 (Applemen, Bd. member, dissenting). Furthermore, deportation is imposed for violation of the same immigration laws on which criminal prosecutions are based. As Board Member Applemen noted in his dissent in *Sandoval*,

In essence, civil and criminal proceedings walk hand in hand in intrasovereign wedlock [t]he government may have a criminal action against an alien for violation of [the immigration laws] . . . thrown out because of fatally contaminated evidence, and then turn right around and proceed against him in a deportation proceeding of equal or greater consequence, relying on the identical evidence. This is wrong. . . . Underlying the majority decision is the premise that there is something inherent in a civil deportation proceeding, as against a criminal proceeding, which makes the application of the rule (a) less necessary, and (b) less effective. Neither of these assumptions is acceptable.

Id. at 95-96.

¹⁰ The Court in *Janis* pointedly refrained from adopting a categorical test making the applicability of the exclusionary rule turn on the characterization of the proceeding as criminal, quasi-criminal or civil. Had it intended to do so, its lengthy analysis of the deterrent effect on state police of excluding evidence from federal civil proceedings would have

had never invoked the rule in a purely civil proceeding, 428 U.S. at 447, the Court adopted an approach

been a futile exercise. Furthermore, the Court would not have left open the question whether the exclusionary rule is to be applied in civil cases involving intrasovereign violations, cases where the evidence sought to be excluded is seized by agents of the same sovereign attempting to use the tainted evidence in a civil proceeding. *United States v. Janis*, 428 U.S. at 456 n.31. Such a test for application of the exclusionary rule bears no relationship to the policy objectives pursued by application of the rule. As Judge Newman pointed out in *Tirado v. Commissioner*, 689 F.2d 307, 313-14 (2d Cir. 1982),

A test for the exclusionary rule that turns on the civil or criminal character of the proceeding does not comport with an objective of achieving substantial deterrence. . . . More important, the rule *can* have a deterrent effect in appropriate civil proceedings, as numerous federal courts have recognized. . . . And if it is not used in such circumstances where it is needed, "the Government would be free to undertake unreasonable searches and seizures in all civil cases without the possibility of unfavorable consequences." We therefore agree that the exclusionary rule can be properly and beneficially applied in those civil proceedings where it has a realistic prospect of achieving marginal deterrence.

The dissent reads *United States v. Calandra*, 414 U.S. 338 (1974) as dictating application of the exclusionary rule depending on the civil or criminal nature of the proceeding. We do not so read *Calandra*. The entire focus of the Court in *Calandra* was on whether exclusion of illegally seized evidence from grand jury proceedings would significantly further the goal of deterrence of police misconduct. The Court concluded that because illegally seized evidence was already excluded from criminal trials, exclusion of such evidence from grand jury proceedings would not provide significant incremental deterrence. As Justice Powell noted for the majority,

Any incremental deterrent effect which might be achieved by extending the rule to grand jury proceedings is un-

that calls for selective application of the rule in civil cases. Consistent with its view that the "prime purpose of the [exclusionary] rule . . . is to deter future unlawful police conduct,"¹¹ 428 U.S. at 446, quoting

certain at best. Whatever deterrence of police misconduct may result from the exclusion of illegally seized evidence from criminal trials, it is unrealistic to assume that application of the rule to grand jury proceedings would significantly further that goal.

Id. at 351. There was simply no suggestion in *Calandra* that the civil or criminal nature of the case had anything to do with whether the exclusionary rule should be applied.

The dissent's suggestion, *see infra* p. —, that *NLRB v. South Bay Daily Breeze*, 415 F.2d 360 (9th Cir. 1969), *cert. denied*, 397 U.S. 915 (1970), dictates application of the rule depending on the civil or criminal character of the case is incorrect. There, we held that the exclusionary rule should not be applied to exclude evidence from an NLRB hearing because the challenged evidence was not seized directly by agents of the government nor with their approval. *Id.* at 363. Our court noted that the rationale for applying the rule did not exist because "[t]here is no logic in excluding evidence to prevent the government from violating an individual's constitutional rights in a case when the government is not guilty of such a violation." 415 F.2d at 364.

We did note in *South Bay Daily Breeze* that even in the absence of Supreme Court decisions declining to apply the rule when the evidence illegally seized was not taken by the government, we would still decline to apply the rule because "neither criminal proceedings nor sanctions are involved." We did not, however, rest our decision on that point. More important, *South Bay Daily Breeze* was decided before the Supreme Court's decision in *Janis*. To the extent that it suggested a focus on the character of a proceeding in deciding whether to apply the rule, we believe it has been displaced by the *Janis* analysis.

¹¹ Although the Supreme Court has emphasized that the deterrent impact of application of the exclusionary rule is the primary inquiry in deciding whether to invoke it, *see Janis*,

United States v. Calandra, 414 U.S. 338, 347 (1974), the Court in *Janis* made deterrence the touchstone of its analysis, inquiring whether application of the exclusionary rule in the case before it would produce a "substantial and efficient" deterrent effect. *Id.* at 453. The analysis was not an empirical one, for there has been little "convincing empirical evidence on the

428 U.S. at 446, the idea that application of the rule is also demanded by the "imperative of judicial integrity" is tenuous. *Elkins v. United States*, 364 U.S. 206, 222 (1960) (rule applied in federal criminal proceeding despite fact that state officials were responsible for Fourth Amendment violation); *Brown v. Illinois*, 422 U.S. 590, 599 (1975) ("application of the exclusionary rule . . . protect[s] Fourth Amendment guarantees in two respects: 'in terms of deterring lawless conduct by Federal officers,' and by 'closing the doors of the federal courts to any use of evidence unconstitutionally obtained.' . . . These considerations of deterrence and of judicial integrity, by now, have become rather commonplace in the Court's cases" [citing *Wong Sun v. United States*, 371 U.S. 471, 486 (1963)]). See also *United States v. Calandra*, 414 U.S. 338, 357 (1974) (Brennan, J., dissenting) ("The exclusionary rule, if not perfect, accomplished the twin goals of enabling the judiciary to avoid the taint of partnership in official lawlessness and of assuring the people—all potential victims of unlawful government misconduct—that the government would not profit from its lawless behavior, thus minimizing the risk of seriously undermining popular trust in government."); *Tirado v. Commissioner*, 689 F.2d at 315-16 (Oakes, J., concurring) ("I disagree that deterrence is the sole rationale of the exclusionary rule. . . . [Justice Day in *Weeks v. United States*, 232 U.S. 383 (1914)] stressed personal rights and correlative governmental duties"). While we have no occasion to rule on the question whether this rationale has been entirely supplanted by a deterrence approach, it is worth noting that concern for maintenance of the integrity of the judicial system and the fairness of deportation proceedings, in which the government is already given tremendous discretion and advantage, also tends to support the result we reach here.

effects of the rule." 428 U.S. at 446. Instead, the Court's evaluation of the deterrent effect of invoking the rule was based on "common sense" and on its "own assumptions of human nature and the inter-relationship of the various components of the law enforcement system." 428 U.S. at 459.

In deciding whether to apply the exclusionary rule in the civil case at issue in *Janis*, the Court balanced the deterrent benefit to be gained against the social cost of invoking the rule. The Court first focused on the likelihood that state police would be deterred from violating the Fourth Amendment if evidence they seized illegally was excluded from federal civil proceedings. The Court reasoned that "the deterrent effect of the exclusion of relevant evidence is highly attenuated when the 'punishment' imposed upon the offending . . . officer is the removal of that evidence from a civil suit by . . . a different sovereign," *id.* at 458. The Court did not believe that application of the exclusionary sanction in such a case would effectively deter state police because the use of evidence in federal civil proceedings is not within their "zone of primary interest." *Id.* The strength of the connection between the purposes of the offending officers and the purposes of those seeking to use the illegally seized evidence was critical to the Court's assessment of the deterrent value of applying the rule: the closer the connection, the greater the marginal deterrent value of imposing the sanction. Conversely, the deterrent effect of the sanction was believed to be attenuated when the sovereign forbidden from using the evidence is not the same sovereign whose agents illegally obtained it.

As a second step in its analysis, the Court considered the extent to which the persons whose "conduct

is to be controlled," *id.* at 448, are already subject to the deterrent effects of the rule. In *Janis*, the Court reasoned that because evidence obtained illegally by state police was already inadmissible in both state and federal criminal proceedings, little if any additional deterrence of state police misconduct would be gained by excluding such evidence from federal civil proceedings.

Finally, the Court determined that the attenuated impact of excluding relevant evidence from a federal civil proceeding, coupled with the existing deterrent effect of the rule on state police, created a "situation in which the imposition of the exclusionary rule . . . [was] unlikely to provide significant, much less substantial, additional deterrence." *Id.* at 458. Accordingly, the Court had no difficulty in concluding, as the third step in its analysis, that the social cost of invoking the rule—hampering enforcement of admittedly valid laws by removing "concededly relevant and reliable evidence," *id.* at 447—outweighed its deterrent value in a civil case involving an intersovereign violation. The Court thus held that "the judicially created exclusionary rule should not be extended to forbid the use in the civil proceedings of one sovereign of evidence seized by a criminal law enforcement agent of another sovereign." *Id.* at 459-60.

IV

A

Appellant Sandoval, in arguing that evidence unlawfully obtained by INS agents should be excluded from his deportation hearing, presents us with a question expressly left open in *Janis*—whether the exclusionary rule should be applied in civil cases involving "intrasovereign violations": cases in which "the officer committing the unconstitutional search or sei-

zure[s] [is] an agent of the [same] sovereign that [seeks] to use the evidence." 428 U.S. at 455-56 n.31. In deciding Sandoval's appeal, however, we engage in the same inquiry the Court made in *Janis*, assessing the marginal deterrent benefit of imposing the exclusionary sanction against the INS, and weighing that effect against the social cost of excluding from deportation hearings evidence that is the product of unlawful conduct by INS agents.¹²

¹² Judge Alarcon in dissent relies on a number of cases which are inapposite because of the fundamental distinction between the jurisprudence of the exclusionary rule on the one hand and that of constitutional rights personal to an accused on the other. The Fourth Amendment exclusionary rule, unlike the rules excluding evidence obtained in violation of the Fifth and Sixth Amendments, is not intended to remedy the constitutional violation personally suffered by the party who invokes it; rather, it is a prophylactic rule designed primarily to deter future invasions of the Fourth Amendment privacy interests of all persons, citizens and aliens alike. As the Court noted in *Calandra*:

The purpose of the exclusionary rule is not to redress the injury to the privacy of the search victim:

"[T]he ruptured privacy of the victims' homes and effects cannot be restored. Reparation comes too late."

Linkletter v. Walker, 381 U.S. 618, 637 (1965).

Instead, the rule's prime purpose is to deter future unlawful police conduct and thereby effectuate the guarantee of the Fourth Amendment against unreasonable searches and seizures:

The rule is calculated to prevent, not to repair. Its purpose is to deter—to compel respect for the constitutional guaranty in the only effectively available way—by removing the incentive to disregard it.

Elkins v. United States, 364 U.S. 206, 217 (1960).

In sum, the rule is a judicially created remedy designed to safeguard Fourth Amendment rights generally through

The first step in the inquiry mandated by *Janis* is an examination of the connection between those who

its deterrent effect, rather than a personal constitutional right of the party aggrieved.

414 U.S. at 348-49.

Thus the cases relied on by the dissent, *Galvan v. Press*, 347 U.S. 522 (1954); *Carlson v. Landon*, 342 U.S. 524 (1952); *Harisiades v. Shaughnessy*, 342 U.S. 580 (1952); *Helvering v. Mitchell*, 303 U.S. 391 (1938); *United States ex rel Bilokumsky v. Tod*, 263 U.S. 149 (1923); *United States ex rel Turner v. Williams*, 194 U.S. 279 (1904); *Abel v. United States*, 362 U.S. 217 (1960); *Martin-Mendoza v. Immigration and Naturalization Serv.*, 499 F.2d 918 (9th Cir. 1974); *Lavoie v. Immigration and Naturalization Serv.*, 418 F.2d 732 (9th Cir. 1969), *cert. denied*, 400 U.S. 854 (1970); and *United States ex rel Cicella v. Sahli*, 216 F.2d 33 (7th Cir. 1954) are inapposite. As cases dealing with rights under the ex post facto clause and the Fifth, Sixth and Eighth Amendments, they have to do with rights personal to the defendant. In any event, all respondents in deportation proceedings, whatever their status, are protected by the due process clause even though they may not enjoy the full panoply of Fifth and Sixth Amendment safeguards afforded a defendant in a criminal proceeding. *Shaughnessy v. Mezei*, 345 U.S. 206, 212 (1953) ("It is true that aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to the traditional standards of fairness encompassed in due process of law.")

As for *Fong Yue Ting v. United States*, 149 U.S. 698 (1892), it too has nothing to do with the Fourth Amendment. *Fong Yue Ting* involved a challenge by several Chinese laborers to a federal statute providing that Chinese in the United States could remain only upon proof that they were here in 1882. Such proof had to consist of a certificate issued by the Collector of Internal Revenue or, if such certificate were lost or stolen, of the testimony of at least "one credible white witness." The Court held that the act was constitutional.

Equally telling is the fact that the proceeding in *Fong Yue Ting* had nothing to do with determining whether the Chinese

illegally obtained the evidence and those who seek to use it in subsequent proceedings. In this case, the connection could not be more direct: those who violated the Fourth Amendment in obtaining the evidence and those who seek to use it in deportation proceedings are members of the same government agency, the INS. Thus, we are presented not only with an intrasovereign violation, but with an intra-agency violation as well. The connection between the offending officers and those who seek to use the tainted evidence is further strengthened by an identity of purpose between the two. The immigration officers who interrogated Sandoval after arresting him did so exclusively to aid in filling out INS Form I-213, the form used by INS attorneys at Sandoval's deportation hearing to prove his deportability. When, as here, the offending officer and the prosecutor share a common goal, the deterrent effect of the exclusionary sanction is maximized: an officer will have little incentive to violate the Fourth Amendment if he knows that tainted evidence will be worthless to the prosecutorial agency he serves. See *Tirado v. Commissioner*, 689 F.2d 307, 310-11 (2d Cir. 1982).

Taking the second step of the *Janis* analysis, we find that applications of the exclusionary sanction outside the deportation context are not likely to be effective in deterring immigration officers from violating the Fourth Amendment. While it is true that evidence

were aliens. Chinese in 1892 could not legally become naturalized citizens of the United States. The defendants in the case were undisputably aliens and the question presented was whether they had met the statutory requirements to remain in the country. The entire purpose of a deportation proceeding, however, is to determine whether someone is an alien and, if so, whether he is in the country illegally.

seized illegally could not be used if Sandoval were to be criminally prosecuted for violation of the immigration laws, deportation, not criminal prosecution, is clearly the prime concern of immigration officers. Aliens apprehended for violation of the immigration laws are rarely subjected to criminal prosecution; in the vast majority of cases, they are either allowed to depart voluntarily or are deported following formal proceedings. See United States Immigration and Naturalization Service, 1979 *Annual Report* 5, 20 (fewer than 2% of the deportable aliens who are apprehended are ever convicted of criminal violations). Thus, criminal prosecution is simply not within the immigration officer's "zone of primary interest." *Janis*, 428 U.S. at 458. Contrary to the BIA's conclusion in *Matter of Sandoval*, 17 I & N Dec. at 78, therefore, we deem it highly unlikely that immigration officers will be deterred from violating the Fourth Amendment by the prospect of unsuccessful criminal prosecutions.¹³

¹³ The BIA reasoned also that even if an alien's *identity* is discovered through an illegal arrest or search, the INS can still establish the alien's deportability with untainted evidence from its files. See *Hoonsilapa v. Immigration and Naturalization Serv.*, 575 F.2d 733, 738 (9th Cir. 1978), *modified*, 586 F.2d 755 (9th Cir. 1978) ("We hold that there is no sanction to be applied when an illegal arrest only leads to discovery of the man's identity and that merely leads to the official file or other independent evidence.") Thus, the BIA concluded, as long as INS agents believe they will have access to independent evidence of alienage, they will not be deterred by the prospect of suppression of evidence obtained by illegal conduct. *Matter of Sandoval*, 17 I & N Dec. at 78. That conclusion is unrealistic. It is indeed the law of this circuit, see *Hoonsilepa*, *supra*, that a person's identity cannot be suppressed, and may thus provide a link to independent evidence in INS files. INS figures suggest, however, that in the large majority of cases the INS has no independent evidence. See

In sum, the *Janis* analysis, when applied here, compels the conclusion that the deterrent impact of invoking the rule in deportation proceedings will be "substantial and efficient."¹⁴ *Janis*, 428 U.S. at 453. Not only are the officers seizing the evidence members of the same agency as those seeking to use it, they also share a common goal—the deportation of aliens in the country illegally. Finally, there are no other applications of the exclusionary rule which effectively deter the offending officers from violating the Fourth Amendment. If the exclusionary rule is the "‘strong medicine’ its proponents claim it to be," *Janis*, 428 U.S. at 453, then we can imagine no more effective application than in these circumstances. Indeed, there is authority that the sanction is "routinely" applied in cases where the deterrent effect of its application is as great as it is here. See *Tirado v. Commissioner*, 689 F.2d at 310, 311 (rule "routinely" applied in "core" cases which "bar use of illegally seized items as affirmative evidence in the trial of the [very same]

Matter of Sandoval, 17 I & N Dec. at 85 (Farb, Bd. member, concurring); see also *Wong Chung Che v. Immigration and Naturalization Serv.*, 565 F.2d 166, 168 (1st Cir. 1977). To prove alienage in those cases in which it has no independent evidence, the INS must rely on evidence obtained simultaneously with the apprehension. *Id.* Since an INS agent will not know in advance whether the alien to be searched or apprehended is one about whom the INS has existing information, we cannot conclude that this possibility significantly undermines the deterrent value of suppression.

¹⁴ Because the circumstances here present such a compelling case for application of the exclusionary rule, and because we have here much more than simply an intrasovereign violation, we need not decide the broad question left open in *Janis*—whether the exclusionary rule applies generally in civil proceedings when intrasovereign violations are involved.

matter for which the search was conducted").¹⁵ Nonetheless we proceed, under the *Janis* analysis, to as-

¹⁵ In *Tirado*, the Second Circuit held the exclusionary rule inapplicable to a civil case involving an intrasovereign violation: use by the IRS in a federal tax proceeding of evidence seized illegally by federal narcotics agents. Despite its holding, however, the court noted that

courts routinely prohibit governmental authorities from using illegally seized evidence in the proceedings for which the search was conducted, not only in a criminal prosecution, *e.g.*, *Mapp v. Ohio*, 367 U.S. 643 (1961), but also in a variety of civil proceedings, *e.g.*, *Wong Chung Che v. INS*, 565 F.2d 166, 168-69 (1st Cir. 1977) (documents seized by immigration officials investigating illegal aliens excludable from subsequent deportation hearing); *Knoll Associates v. FTC*, 397 F.2d 530, 534-35 (7th Cir. 1968) (documents seized for purposes of FTC investigation excluded from resulting hearing); *Smyth v. Lubbers*, 398 F. Supp. 777, 786 (W.D. Mich. 1975) (drugs seized from dormitory rooms by state college officials investigating violations of college rules excluded from resulting disciplinary proceeding); *Iowa v. Union Asphalt & Road-oils, Inc.*, 281 F. Supp. 391, 406-09 (S.D. Iowa 1968), *aff'd sub nom. Standard Oil Co. v. Iowa*, 408 F.2d 1171 (8th Cir. 1969) (business records seized by state attorney general excluded from resulting civil antitrust proceeding).

689 F.2d at 311.

We agree, and would add to this list other "core" cases, *id.* at 311, in which the exclusionary rule was applied as a matter of course. *See, e.g.*, *Powell v. Zuckert*, 366 F.2d 634, 639-41 (D.C. Cir. 1966), (error to admit goods illegally seized from home of civilian employee by Air Force special investigations officers for use in Air Force proceeding to discharge the employee); *Rogers v. United States*, 97 F.2d 691 (1st Cir. 1938) (liquor illegally seized by federal government officers excluded from use in subsequent civil suit by government to recover Customs duties); *United States v. Blank*, 261 F. Supp. 180,

sess the social cost of applying the exclusionary rule in deportation proceedings and to balance that cost against the substantial deterrent impact of the sanction on INS misconduct.

B

The social cost of applying the exclusionary rule in deportation proceedings must be measured primarily in terms of the number of aliens who will succeed in escaping deportation by the suppression of illegally obtained evidence of their alienage or illegal status. When analyzed in these terms, it becomes clear that only an infinitesimal fraction of the illegal alien population will mount challenges based on the exclusionary rule and that the small number who do so successfully will not appreciably increase the number of illegal aliens in our midst.

Historically, the exclusionary rule has been invoked infrequently in deportation proceedings. As it noted in *Matter of Sandoval*, the BIA was able to find only two reported immigration cases since 1899 in which the rule was applied to bar unlawfully seized evidence, only one other case in which the rule's application was specifically addressed, and fewer than fifty BIA proceedings since 1952 in which a Fourth Amendment challenge to the introduction of evidence was

183-84 (N.D. Ohio 1966) (evidence illegally seized by IRS agents excluded in federal civil tax assessment proceeding); *Lassoff v. Gray*, 207 F. Supp. 843, 846-49 (D.C. Ky. 1962) (IRS assessment of excise wagering tax illegally made where IRS had used unconstitutionally seized evidence to establish liability). But see *Morale v. Grigel*, 422 F. Supp. 988, 1000-01 (D.N.H. 1976) (evidence illegally seized in student dormitory by school officials admitted in subsequent school disciplinary proceeding).

even raised. 17 I & N Dec. at 80, 98-99.¹⁶ It is perhaps curious that the rule has been invoked so sparingly in deportation proceedings, especially in view of the fact that immigration law practitioners have been informed by the major treatise in their field that the exclusionary rule was available to clients facing deportation. See 1A C. Gordon and H. Rosenfield, *Immigration Law and Procedure* § 5.2c at 5-31 (rev. ed. 1980). One plausible explanation is that immigration officers have not committed many Fourth Amendment transgressions because they have been effectively deterred by the exclusionary rule. As noted above, the INS, at least before the BIA's 1979 decision in *Matter of Sandoval*, operated in a legal regime in which the cases and commentators uniformly sanctioned the invocation of the rule in deportation proceedings.

A second plausible explanation for the paucity of challenges based on the exclusionary rule is the relative ease with which aliens who are apprehended may reenter the United States following voluntary departure. Approximately 85% of the aliens present in this country enter from Mexico, from which entry without inspection is not difficult. See Department of Justice, *Special Study Group on Illegal Immigrants from Mexico: A Program for Effective and Humane Action on Illegal Mexican Immigration* 6 (1973). Thus those facing deportation to Mexico may find it

¹⁶ The BIA declined to identify which "reported cases" it understood to treat the exclusionary rule issue, although it had previously made reference to *Ex parte Jackson* and *United States v. Wong Quong Wong*, *supra*. The point important for our consideration, however, is that it could isolate few cases of any sort in which the exclusion of evidence was discussed, much less accepted.

simpler to leave voluntarily with the thought of re-entering the United States at a later time¹⁷ rather than remain to litigate the issue of their deportability.¹⁸

Whatever the explanation, our holding today should result in no significant increase in the frequency with which the exclusionary rule is invoked in deportation proceedings. Hence, in assessing the social cost of holding that the rule bars the INS from using illegally obtained evidence in deportation proceedings, we adopt the realistic premise that the number of aliens likely to escape deportation by invoking the rule is inconsequential. Moreover, whatever number do benefit from application of the rule is insignificant when compared with the flood of illegal immigrants who enter the United States each year. Although statistics on the number of aliens in this country illegally are necessarily unverifiable, available estimates indicate that there are from 3½ to 12 million, and it is believed that over 500,000 more enter illegally each year. See Note, *The Exclusionary Rule in Deportation Proceedings: Time for Alternatives*, 14 J. Int'l L. & Econ. 349, 350 (1980) (5 million); Report of the

¹⁷ INS statistics indicate that the overwhelming majority of those apprehended choose to depart voluntarily: of the approximately one million illegal aliens who are apprehended each year, fewer than 2.5% are deported following formal INS adjudication of their status. *Statistical Yearbook of the Immigration and Naturalization Service* (1979).

¹⁸ Those who remain to litigate their status and are deported following formal proceedings are also subjected to constraints on any legal reentry they may later try to make. See 8 U.S.C. § 1182(a) (16), (17) (aliens who have been deported are "ineligible to receive visas and shall be excluded from admission into the United States").

Senate Judiciary Committee, S. Rep. 97-485, on S.2222 at 4 (97th Cong. 1982) (citing estimates of the Select Commission on Immigration and Refugee Policy that 3.5 to 6 million illegal aliens were present as of 1978, and noting that "whatever the number four years ago, there are surely many more now"); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878 (1975) (12 million). If application of the rule results in aborted deportation proceedings in as many as one hundred cases a year—a number twice as great as the number of evidentiary challenges raised before the BIA since 1952—the result would be an increase of less than one one thousandth of one percent in the illegal alien population. This is hardly an exorbitant price to pay for effective deterrence of INS misconduct. Indeed, the BIA itself has conceded that application of "the rule would not appear to have the potential to significantly impact on this country's immigration laws and policies," *Matter of Sandoval*, 17 I & N Dec. at 80.¹⁹

Thus the government cannot—and does not—base its argument about anticipated social costs on the numbers of illegal aliens who will succeed in remaining in this country by invoking the exclusionary rule.²⁰ Rather, the principal concern of the govern-

¹⁹ We thus reject the contention of the BIA, *Matter of Sandoval*, 17 I & N Dec. at 80, and the dissent, *see infra* p. —, that the potential administrative costs of applying the exclusionary rule outweigh its deterrent value. Their drastic predictions of the fiscal and administrative consequences that will result from application of the rule are not defensible in light of past experience. *See infra* p. —.

²⁰ Indeed, for the government to do so would put it in the awkward position of arguing that violations of the Fourth Amendment by immigration officers are widespread. The

ment and the BIA seems to be that by permitting otherwise deportable aliens to remain in the country, the courts will be sanctioning a continuing violation of the immigration laws. Yet neither the BIA's nor the government's assessment of the seriousness of this problem withstands close scrutiny. It strikes us as far-fetched to suggest that sanctioning the continuing "status crime" of illegal alienage is as threatening or damaging to society as is releasing, without punishment, a person known to have violated other provisions of the criminal laws. Illegal aliens are not, as a class, *per se* dangerous to the law-abiding members of the community. In fact just the opposite is true. "Mexican immigrants show no evidence of rejecting fundamental American values and institutions," Cornelius, Chavez & Castro, *Mexican Immigrants and Southern California: A Summary of Current Knowledge* 9 (1982), and common sense tells us that illegal aliens, fearing detection by authorities, have a special incentive to be law-abiding residents of this country. In contrast, the tendency of persons who have once committed crimes to do so again is well documented, see, e.g., *National Council on Crime and Delinquency, Uniform Parole Rep. Characteristics of the Parole Population, 1978* at 3 (1980) (26% of persons committed to prison had served one or more prior prison terms).

We recognize that the problem of illegal immigration is an intractable one. Despite the best efforts of the INS, millions of aliens have managed to enter this country without inspection and to remain here un-

government cannot have it both ways. Either violations—and therefore successful challenges—will be few, or they will be extensive, resulting in greater impact of application of the rule but highlighting the need for a strong deterrent.

detected. For various reasons, as Justice White noted seven years ago, "[t]he entire system [of enforcement of the immigration laws] has been notably unsuccessful in deterring or stemming [the] heavy flow of illegal immigrants." *United States v. Ortiz*, 422 U.S. 891, 915 (1975) (White, J., dissenting). Indeed, it has been estimated that 21,000 officers would be needed to control the 75-mile stretch of border at El Centro, California alone. *Id.* at 900 n.2 (appendix to opinion of Burger, C.J., concurring). We thus appreciate the enormity of the enforcement task that Congress has assigned the INS. We cannot believe, however, that the difficulty of the task would be perceptibly eased by exempting the INS from the exclusionary sanction.

Were we to give the INS a license to use tainted evidence in deportation proceedings, the agency could no doubt deport some handful of additional aliens who would otherwise escape deportation by invoking the rule. But surely the incremental social cost of harboring those few aliens who do succeed in escaping deportation on this basis and remain in the United States²¹ is inconsequential when compared with the marginal deterrence of INS misconduct to be gained by application of the rule. We thus conclude that the marginal deterrent benefit far outweighs the social cost of barring the INS from using in deportation proceedings evidence which its officers seize in violation of the Fourth Amendment.

Before holding that the rule must be applied in deportation proceedings, however, we treat the final

²¹ There is, of course, nothing to prevent the INS from later deporting such an illegal alien on evidence not the fruit of a Fourth Amendment violation.

contention advanced in *Matter of Sandoval*. Both the BIA in that case and the dissent here suggest that even if the deterrent effect of application of the exclusionary rule in the deportation context is substantial, there are less costly alternatives by which to achieve the rule's goal of deterrence. We disagree. The alternatives proposed simply will not provide the deterrent necessary to ensure that official conduct comports with the Fourth Amendment.

C

The alternatives to the exclusionary rule suggested by the BIA in *Sandoval* are both unrealistic and unacceptable. The BIA reasoned that the offending officer could be sued for damages in a *Bivens*²² action. *Matter of Sandoval*, 17 I & N Dec. at 82. Yet it is unlikely enough that citizens whose rights have been violated will bring a civil action for damages. It is even harder to imagine that illegal aliens—particularly those who have been deported—will do so. See generally *Exclusionary Rule Note, supra*, at 369-70; Schroeder, *Deterring Fourth Amendment Violations: Alternatives to the Exclusionary Rule* 69 Geo. L. J. 1361, 1393 (1981) (“even damage actions that are pursued with reasonable frequency before an unbiased tribunal and against a financially able government . . . are not an adequate substitute for the exclusionary rule.”) Over 97% of the illegal entrants apprehended by the Border Patrol in 1979 were Mexican

²² See *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971) (providing means by which officers who violate Fourth Amendment rights may be sued in their individual capacities).

nationals. United States Immigration and Naturalization Service, *1979 Statistical Yearbook of the Immigration and Naturalization Service*, 80. These individuals have a poor command of English, are fearful of authority and are unfamiliar with American culture and values. W. Cornelius, L. Chavez & Castro, *supra*, at 57-8. It is hard to believe that they are likely to possess the financial, emotional or cultural wherewithal to pursue a civil damage action against an INS officer when their rights have been violated.

Similarly, prospective injunctive relief, while effective in some circumstances, *see, e.g., International Ladies Garment Workers Union v. Sureck*, 681 F.2d 624 (9th Cir. 1982), is not a satisfactory alternative here. Injunctive relief is generally available only after broad scale violations that result from official policy, and is rarely, if ever, effective to deter violations that result not from official policy but from an individual officer's overzealousness. *See generally Exclusionary Rule Note, supra* at 367-68; Schroeder, *supra*, at 1407-09.

The final alternative, internal discipline, presents a closer question. In theory, self-policing should be the most effective deterrent to illegal conduct because it offers the most direct and immediate feedback to the offending officer. Yet the practical experience of other law enforcement agencies indicates that internal review is rarely effective in deterring Fourth Amendment violations. *See Schroeder, supra*, at 1401-07; Note, *The Administration of Complaints by Civilians Against the Police*, 77 Harv. L. Rev. 499 (1964).

Judge Alarcon is apparently convinced that the INS system does not suffer the defects of other self-policing systems. *See, infra, p. —* (Alarcon, J.,

dissenting). Yet, although his dissent cites at length from the INS disciplinary guidelines, it offers no evidence whatsoever that the guidelines are being consistently and effectively enforced. We agree that the INS has made a commendable effort to design an effective disciplinary system, but "[i]t would . . . be myopic to presume from the existence of a remedy its effective and consistent implementation." *Exclusionary Rule Note, supra*, at 371. Even if we could assume adequate enforcement of the INS guidelines, it would be unrealistic to assume that illegal aliens who have been the victims of unlawful behavior by INS agents will report their experiences to the INS. *See Schroeder, supra*, at 1402.

We are hopeful that the INS' efforts will be an effective complement to the exclusionary rule. Yet we are hesitant to place sole responsibility for ensuring that citizens and aliens alike are free from unwarranted government intrusions into their privacy on the same officers responsible for patrolling the borders and apprehending persons they suspect are aliens in this country illegally. As Justice Murphy observed in *Wolf v. Colorado*, 338 U.S. 25 (1949) (*overruled by Mapp v. Ohio*, 367 U.S. 643 (1961)), "[s]elf-scrutiny is a lofty ideal, but its exaltation reaches new heights if we expect a District Attorney to prosecute himself or his associates for well-meaning violations of the search and seizure clause during a raid the District Attorney or his associates have ordered." 338 U.S. at 42 (Murphy J., dissenting).

CONCLUSION

In holding that evidence obtained by the INS in violation of the Fourth Amendment is inadmissible in subsequent deportation proceedings, we do not break

new legal ground. Rather, we follow a line of case law directly on point broken only by the BIA's split decision in *Matter of Sandoval*. We also follow a line of cases in which the exclusionary rule has been applied as a matter of routine where those who illegally seized evidence were of the same agency and pursuing the same law enforcement goals as those who sought to use it. Finally, although the Supreme Court has expressly reserved the question whether the rule applies in cases in which those who illegally seized the evidence are agents of the same sovereign who seeks to use it, we believe that its analysis in *Janis* dictates the result we reach in this particular case.

Until 1979, when the BIA decided *Matter of Sandoval*, immigration officers had been making arrests and seizing evidence apparently on the assumption that evidence they obtained in violation of the Fourth Amendment could not be used to prove illegal alienage. 17 I & N Dec. at 93 (Applemen, Bd. member, dissenting). There is no indication that the belief that the exclusionary rule applied significantly impaired the investigative or prosecutorial efforts of the INS. The 200,000 deportation cases successfully prosecuted between 1971 and 1979, the millions of voluntary departures during the same period, and the paucity of cases terminated because of Fourth Amendment violations belie such a notion. We simply cannot believe that our confirmation of the historic view that the exclusionary rule applies in deportation proceedings will seriously impede the INS in the discharge of its statutory duties. Indeed, as aptly put by the dissent in *Matter of Sandoval*, "[t]he rule having been accepted and followed for so many years, the natural inquiry is what reason is there for a

change now?" *Matter of Sandoval*, 17 I & N Dec. at 94 (Applemen, Bd. member, dissenting). Whatever the solution to the problem of illegal immigration, we do not think that it lies in judicial compromise of Fourth Amendment values.

If the Fourth Amendment is to retain its vitality as guardian of the privacy of citizens and non-citizens alike, the federal judiciary must be constantly vigilant in ensuring adherence to its commands by those charged with enforcing our laws. We are convinced that the best and indeed the only realistic way to ensure that immigration officers respect the precious values embodied in the Fourth Amendment is to apply the exclusionary rule in deportation proceedings.

For the foregoing reasons, we hold that Sandoval's statements were inadmissible in his deportation hearing and REVERSE his order of deportation. We VACATE Lopez's order of deportation and REMAND his case for further proceedings consistent with this opinion.

GOODWIN, J., SPECIALLY CONCURRING

Under the compulsion of *Intern. Ladies' Garment Workers', Etc. v. Sureck*, 681 F.2d 624 (9th Cir. 1982), which is the law of this circuit, but with which I disagreed, I concur in the majority opinion. I do not believe that a "Terry Stop" in a work place where the immigration officers have a right to be necessarily ripens into an unlawful seizure on the facts of this case. When, however, the court is satisfied that a Fourth Amendment violation has occurred, then I believe that the exclusionary rule, for better or for worse, applies to deportation hearings as well as to criminal prosecutions.

ALARCON, Circuit Judge, with whom Wright, Wallace and Poole, Circuit Judges, join dissenting:

I respectfully dissent.

Today the majority has extended the exclusionary rule to the suppression of oral statements in *civil* deportation proceedings. None of the cases relied upon by the majority support this radical departure from existing law.

It is equally remarkable that the majority has chosen this drastic example of judicial law making at a time when the United States Supreme Court has raised questions as to whether:

the rule requiring the exclusion at a *criminal* trial of evidence obtained in violation of the Fourth Amendment, *Mapp v. Ohio*, 367 U.S. 643 (1961); *Weeks v. United States*, 232 U.S. 383 (1914), should to any extent be modified, so as, for example, not to require the exclusion of evidence obtained in the reasonable belief that the search and seizure at issue was consistent with the Fourth Amendment.

Illinois v. Gates, — U.S. —, 103 S.Ct. 436 (1982) (emphasis added).

In 1886, the United States Supreme Court first applied the exclusionary rule in *Boyd v. United States*, 116 U.S. 616 (1886). Since that date our highest Court has never applied the exclusionary rule in a civil proceeding. The Court has limited application of the rule to criminal or quasi-criminal proceedings.¹

¹ See *United States v. Janis*, 428 U.S. 433, 447 & n.17 (1976). In *Janis*, the Court noted that it had never applied the rule "to exclude evidence from a civil proceeding, federal or state."¹⁷ *Id.* at 447. In footnote 17, the Court explained that the rule has been applied in civil proceedings involving

Six years after *Boyd*, the Supreme Court noted the clear differences between a criminal trial and a civil deportation proceeding in the following language:

The order of deportation is not a punishment for crime. It is not a banishment, in the sense in which that word is often applied to the expulsion of a citizen from his country by way of punishment. It is but a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend. He has not, therefore, been deprived of life, liberty or property, without due process of law; and the provisions of the Constitution, securing the right of trial by jury, and prohibiting unreason-

forfeiture of an article used in violation of the criminal law because "forfeiture is clearly a penalty for the criminal offense. . . ." *Id.* at n. 17 (quoting *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 701 (1965)). Although the forfeiture proceeding is deemed civil, it is "quasi-criminal" in nature. See *Janis*, 428 U.S. at 447 n.17 (quoting *Boyd v. United States*, 116 U.S. 616, 634 (1886)).

In *NLRB v. South Bay Breeze*, 415 F.2d 360, 364 (9th Cir. 1969), *cert. denied*, 397 U.S. 915 (1970), wherein this court declined to extend the exclusionary rule to labor proceedings, we found it significant that the Court had limited application of the rule to a criminal or quasi-criminal proceedings. Again, in 1978, we stated "that the Supreme Court has never applied the exclusionary rule in a civil proceeding suggests that the rule should not be applied to OSHA proceedings." *Todd Shipyards Corp. v. Secretary of Labor*, 586 F.2d 683, 689 (9th Cir. 1978) (citing *United States v. Janis*, 428 U.S. 433, 447 (1976); *NLRB v. South Bay Daily Breeze*, 415 F.2d 360, 364 (9th Cir. 1969), *cert. denied*, 397 U.S. 915 (1970)).

able searches and seizures, and cruel and unusual punishments, have no application.

The question whether, and upon what conditions, these aliens shall be permitted to remain within the United States being one to be determined by the political departments of the government, the judicial department cannot properly express an opinion upon the wisdom, the policy or the justice of the measures enacted by Congress in the exercise of the powers confided to it by the Constitution over this subject.

Fong Yue Ting v. United States, 149 U.S. 698, 730-31 (1893) (emphasis added); *accord Li Sing v. United States*, 180 U.S. 486, 495 (1901).

The majority has neither cited nor discussed this clear pronouncement from our highest Court that the provisions of the constitution prohibiting unreasonable searches and seizures have no application to civil deportation proceedings.

We are told that in the last thirty-two years fewer than fifty challenges have been made on fourth amendment grounds, and that "one possible explanation is that immigration officers have not committed many fourth amendment transgressions . . ." (Maj. Op. 16). I agree.

There is no evidence before us of widespread governmental misconduct that must be deterred by granting certain aliens immunity from our immigration laws. Yet, the majority justifies its new rule of evidence in part by pointing out that "the number of aliens likely to escape deportation by invoking the rule is inconsequential." (Maj. Op. 17). This mode of analysis is in clear conflict with that taken in

Wolf v. Colorado, 338 U.S. 25 (1949), wherein the Supreme Court *refused* to extend the exclusionary rule in the face of "the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence." *Id.* at 31-32.

The majority informs us that those courts that have addressed the issue have each held that evidence in civil deportation proceedings obtained in violation of the fourth amendment is not admissible. (Maj. Op. 7). The authority relied upon by my prevailing colleagues consists of two district court decisions, which are of dubious precedential value in light of contrary statements in the decisions of higher courts, and a more recent decision of the First Circuit which, when reviewing civil deportation proceedings, would *not* require suppression of oral statements obtained after an illegal arrest. *Wong Chung Che*, 565 F.2d 166, 168 (1st Cir. 1977).

To justify its extension of the exclusionary rule to civil deportation proceedings, the majority relies most heavily on *United States v. Janis*, 428 U.S. 433 (1976). Yet, in *Janis*, the Supreme Court refused to extend the exclusionary rule to a civil proceeding in spite of the fact that the same evidence had been excluded on search and seizure grounds in a prior state criminal proceeding.

The majority has failed to respect the admonition of the Supreme Court in *Janis* that: "[t]here comes a point at which courts, consistent with their duty to administer the law, cannot continue to create barriers to law enforcement in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative branches." 428 U.S. at 459.

I.

A.

In its enthusiasm to create an exclusionary rule applicable to civil deportation proceedings, the majority has reversed the order of deportation in the Sandoval-Sanchez matter notwithstanding the fact that Sandoval-Sanchez failed to object to the admissibility of his oral statements on search and seizure grounds. Instead, his counsel sought *termination* of the proceedings on fourth amendment grounds.² Lopez

² Counsel objected to the admission of Form I-213 on grounds of hearsay, lack of jurisdiction, and *Miranda* violations. [SS 37] Subsequently, counsel moved "to suppress I-213 and to terminate the proceedings" because "INS regulations require that the officer who makes the initial arrest is not to be the officer who examines the arrested person for their I-213 purposes but rather some other officer. . ." [SS 61] He further objected on the grounds that another form, I-214, was not executed and there was no showing that Sandoval-Sanchez knowingly waived his *Miranda* rights. [SS 62]

Thus, the motion to terminate the proceedings was not even made on fourth amendment search and seizure grounds. In fact, at the close of the hearing, counsel requested that the immigration judge reconsider his motions and counsel stated, in response to the judge's denial, "well I'm not sure that I have covered all of the grounds that I wish to adduce in support of those motions." [SS 76] The immigration judge indicated that he considered the matter closed. *Id.*

On appeal, counsel renewed objections to Form I-213 on the grounds that "'no proper foundation was laid' for the admission of the document, and the information reflected on the form 'was obtained involuntarily'" and in violation of his *Miranda* rights. [SS 16-17]

He also claimed for the first time on appeal that his client's initial detention and arrest deprived him of due process. The arrest also:

also sought termination of the deportation proceedings—not suppression of evidence³—apparently under

“was ultra vires the Service’s lawful authority and was based upon illegal search and was lacking in probable cause but was invidiously racially discriminatory [sic] and therefore suspect. Respondent was arrested without a warrant although there was no likelihood he would flee. The Judge erred in not granting Respondent’s Motion to Terminate proceedings because of lack of jurisdiction based on an invalid Order to Show Cause and illegal procedure violative of the fourth amendment tainting the proceedings. [SS 22]

The record demonstrates, however, that counsel for Sandoval-Sanchez did not base his motion to terminate on the grounds of illegal arrest or seizure. Thus, counsel moved to suppress and to terminate the proceedings, but not on the ground that his arrest and seizure violated the fourth amendment.

³ Lopez-Mendoza’s fourth amendment contention was “[t]hat the entry of immigration onto the premises . . . where respondent was employed, and his subsequent arrest . . . was invalid, illegal, and that, therefore, this court has no jurisdiction to hear the deportation proceeding at this time.” [L-M 101]. The immigration judge denied Lopez-Mendoza’s motion to terminate the proceedings based on lack of jurisdiction. [L-M 107] The immigration judge stated that the facts surrounding the arrest were irrelevant because “even if an arrest were improper, it does not affect the issue of deportability, the propriety of deportation proceedings, which is considered civil in nature.” [L-M 114]

The record demonstrates that the BIA correctly determined [L-M 002], that Lopez-Mendoza never objected to the admission of form I-213 [L-M 115] or his affidavit. [L-M 116] The immigration judge based his finding of deportation on this evidence.

On appeal to the BIA, Lopez-Mendoza did not argue that this evidence should have been excluded. Rather, he contended that his arrest was illegal and that the exclusionary rule should be expanded so that deportation proceedings may be terminated [L-M 002]. Such expansion, Lopez-Mendoza ar-

the mistaken notion that proof of a fourth amendment violation somehow deprived the immigration court of jurisdiction. A person charged with a crime who has been the victim of an illegal arrest is *not* entitled to *termination* of the proceedings. *See, e.g., Gerstein v. Pugh*, 420 U.S. 103, 119 (1975); *accord Frisbie v. Collins*, 342 U.S. 519, 522 (1952). Clearly, appellants were not entitled to a termination of these civil deportation proceedings because of alleged fourth amendment violations.

Since neither appellant timely moved to suppress evidence on fourth amendment grounds, the exclusionary rule issue is not properly before us. In a criminal proceeding, the failure to move for the suppression of evidence at trial constitutes a waiver of the right to raise the issue on appeal. *See, e.g., Fed. R. Crim. P. 12(b)(3)(f)*; *see also United States v. Wood*, 550 F.2d 435, 439 (9th Cir. 1976).⁴ The same rule applies in civil matters. To preserve the issue for appeal, a party must set forth the specific grounds for objecting to the admissibility of evidence. *See, e.g., Fed. R. Evid. 403.*

We are not told by the majority why it was determined that an alien in a civil deportation proceeding should enjoy the right to raise evidentiary matters for the first time on appeal while a person facing the loss of life, liberty, or property may not do so. The majority has chosen to reach out beyond the record to

gued, "would provide an effective remedy to deportable aliens illegally arrested and [would] deter service officers from making illegal arrests. [L-M 002]

⁴ If good cause for delay is demonstrated, the trial court, in its discretion, may consider the motion. *United States v. Woods*, 550 F.2d 435, 439 (9th Cir. 1976).

fashion a new rule in complete derogation of traditional appellate practice and procedure.

B.

We are informed by the majority that it followed the *Janis* test of balancing "the deterrent benefit to be gained against the social cost of invoking the rule." (Maj. Op. 11). Notwithstanding this assurance, we are not referred to any facts in this record from which it can be reasonably inferred that immigration officers routinely conduct unreasonable searches and seizures. The record is also barren of any facts that would support an inference that extending the exclusionary rule to civil deportation proceedings would act as a significant deterrent to present INS practices. Instead, the majority, relying on materials outside the record in these proceedings, is forced to speculate as to the reasons why "immigration officers have not committed many fourth amendment transgressions." (Maj. Op. 16). Thus, the majority has created a remedy for which there is no demonstrated need.

The majority is also unable to point to any facts in this record from which one can assess the societal costs that will result from the application of the exclusionary rule to civil deportation hearings within the Ninth Circuit. The majority's fancied assumptions about deterrence and societal costs do not comport with the requirement set forth in *United States v. Janis*, 428 U.S. 433, 446-47 (1976) that we should restrict the application of the rule to those situations that most serve its deterrent purpose. Accord *United States v. Calandra*, 414 U.S. 338, 347-48 (1974); cf. *United States v. Vandemark*, 522 F.2d 1019, 1021

(9th Cir. 1975) (exclusionary rule ought not to be applied in a vacuum).

The exclusionary rule is a "drastic measure", *Janis*, 428 U.S. at 459, and the Supreme Court's decisions caution that drastic remedies should be limited to cases where the record sufficiently demonstrates a need. See *Janis* at 453 & n.26, 454, 459. Compare *Wolf v. Colorado*, 338 U.S. 25, 31-32 (1948) (the Court initially refused to extend exclusionary rule to State proceedings because it could not "brush aside the experience of States which deem the incidence of [unlawful] conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence") and *Irvine v. California*, 347 U.S. 128, 136 (1954) ("There is no reliable evidence known to us that inhabitants of those states which exclude the evidence suffer less from lawless searches and seizures than those of states that admit it") with *Mapp v. Ohio*, 367 U.S. 643, 651-52 (1961) (the Court extended the rule to state proceedings in part because it determined that state police misconduct was in fact occurring and other remedies were not deterring it). Cf. *Brown v. Board of Education*, 347 U.S. 483 (1954) (the Court was able to evaluate the case on its facts to determine impact of separate but equal education; record demonstrated need for judicial remedy); *Miranda v. Arizona*, 384 U.S. 436 (1966) (court created rule requiring constitutional admonitions after considering a history of widespread coercive police conduct).

C.

In extending the exclusionary rule to civil deportation cases, the majority has also failed to give ade-

quate consideration to the consequences of this decision on the future status of the alien who gains dismissal of deportation proceedings after a suppression hearing.

The majority has ignored a fundamental distinction between a criminal prosecution and a civil deportation proceeding. When a district court conducting a criminal trial excludes evidence obtained unconstitutionally, it does not thereby immunize the accused from prosecution for *future* criminal activity. An accused can only be prosecuted for specific past criminal activity. No one can be prosecuted solely because he is a person who has chosen to sustain himself by criminal behavior. Criminal sanctions cannot be imposed merely on the basis of the status of the individual. *Robinson v. California*, 370 U.S. 660, 665-68 (1962).

By contrast, being an alien who has entered this country illegally is a status which is a continuing offense under the laws of the United States. A person who wins dismissal of criminal charges because evidence has been suppressed can be arrested and prosecuted if he or she commits a new crime leaving the courthouse. An alien who has entered this country illegally and who thereafter wins dismissal of deportation proceedings under the rule created by the majority is still illegally in this country. Will an alien now be forever immune from deportation, in spite of his or her continuing violation of the immigration laws? Stated differently, does the majority's new rule permit an alien to escape deportation notwithstanding such person's continued and future defiance of our laws under the "fruit of the poisonous tree" concept? *Wong Sun v. United States*, 371 U.S.

471 (1963) has never been so applied in the past in the context of a criminal prosecution. If the majority believes *Wong Sun* is not applicable, then immigration officers will be free to arrest the alien immediately after the suppression motion is granted because the alien continues to violate our immigration laws. If *Wong Sun* applies then such a person is free to remain in this country as long as the alien wishes to do so unless untainted evidence of illegal status is later discovered. The majority has not addressed these hard questions. A thoughtful analysis of the distinction between a criminal prosecution, which concerns past behavior, and deportation proceedings, which deal with continuing violations of the law, should have compelled the majority to reach a conclusion contrary to that adopted today.

D.

The majority, citing *United States v. Wong Quong Wong*, 94 F. 832 (D. Vt. 1899), *Ex Parte Jackson*, 263 F. 110, 112-13 (D. Mont.), appeal dismissed, 267 F. 1022 (9th Cir. 1920), and *Wong Chung Che v. Immigration and Naturalization Service*, 565 F.2d 166 (1st Cir. 1977), states that "[t]he few federal courts which have squarely confronted the question have all held that evidence illegally obtained by federal agents is inadmissible in subsequent deportation proceedings." (Maj. Op. 7). Before adopting a new rule, based at least in part on precedent from other jurisdictions, we should examine this authority and determine independently if these decisions are well reasoned, consistent with relevant decisions of the United States Supreme Court and applicable to the facts before us. Unfortunately, the majority has

failed to provide us a critical analysis of the precedent it invokes.

Our attention is first directed to *United States v. Wong Quong Wong*, 94 F. 832 (D. Vt. 1899). In *Wong Quong Wong*, a district judge in 1899 excluded letters seized from the appellant in a civil deportation proceeding. The trial judge, citing *Boyd v. United States*, 116 U.S. 616 (1886) and *People v. Sharp*, 107 N.Y. 427, 14 N.E. 319 (1887), held that the seizure of the envelopes was unreasonable and "[could] not be used in evidence . . . without violating the protection afforded by the amendments to all persons in this country." *Wong Quong Wong*, 94 F. at 833. Although the district court judge in *Wong Quong Wong* purported to rely on *Boyd*, he neither analyzed, as did the *Boyd* court, whether the civil proceeding was quasi-criminal in nature, nor discussed the distinction between civil and criminal proceedings set forth in *Fong Yue Ting*. Had he done so he may have reached a contrary result.

As noted previously, six years prior to the decision reached in *Wong Quong Wong*, the Supreme Court, in *Fong Yue Ting*, discussed the nature of civil deportation proceedings. The Court characterized these proceedings as civil, and not penal or criminal, in nature. The Court concluded that since civil deportation proceedings are not criminal, the fourth amendment's prohibition against unreasonable searches and seizures have no application. 149 U.S. 698, 730-31 (1893).

In light of this precedent, the *Wong Quong Wong* Court's reliance on *Boyd* is misplaced. *Boyd* involved an action brought by the government to forfeit property for a fraud against the revenue laws. The penalties imposed by the law included monetary fines,

imprisonment, and forfeiture of goods. In deciding the applicability of the fourth and fifth amendments to such a proceeding, the Court held that:

[Because] suits for penalties and forfeitures incurred by the commission of offenses against the law, are of this quasi-criminal nature, we think that they are within the reason of criminal proceedings for all the purposes of the fourth amendment of the Constitution and of that portion of the fifth amendment which declares that no person shall be compelled in any criminal case to be a witness against himself. . . .

116 U.S. at 634. The Court reasoned that a civil forfeiture action, "though technically a civil proceeding, is in substance and effect a criminal one." *Id.* To require production of private papers to prove a violation of the law, and thus the forfeiture of his property, would "[compel one] to be a witness against himself, within the meaning of the Fifth Amendment. . . ." *Id.* at 634-35.

Fong Yue Ting clearly states that civil deportation proceedings are not penal or criminal, but rather, civil in nature. Consequently, *Boyd* does not support the decision rendered in *Wong Quong Wong*. In light of the Supreme Court's clear statement in *Fong Yue Ting*, it is quite obvious that *Wong Quong Wong* was wrongly decided—perhaps because the author simply was unaware that the Supreme Court had earlier commented that the fourth amendment's prohibitions against unreasonable searches and seizures have no application to civil deportation proceedings.

Ex Parte Jackson, 263 F. 110 (D. Mont.), appeal dismissed *sub nom. Andrews v. Jackson*, 267 F. 1022 (9th Cir. 1920), also suffers from this analytical oversight. There, a Montana federal district court judge

in 1920 granted habeas corpus relief on the ground that the physical evidence used against the petitioner in deportation proceedings, consisting of personal papers and pamphlets, was unlawfully seized. No case authority was cited in support of the trial judge's conclusion that such evidence was inadmissible. No reference was made to *Fong Yue Ting* or to the fact that a deportation proceeding is neither a criminal nor a quasi-criminal proceeding. The district court also failed to consider the deterrent impact, if any, that extension of the exclusionary rule to deportation matters might have, or the costs to society if such a rule were adopted, nor the necessity for such a radical change—considerations now required by the Supreme Court after *Calandra* and *Janis*.

The district judge in *Jackson* appears to have assumed that the law of this circuit entitles an alien in a civil deportation proceeding to the same constitutional protections that are available to an accused in a criminal proceeding. The present law of this circuit is to the contrary. In *Lavoie v. INS*, 418 F.2d 732, 734 (9th Cir. 1969), *cert. denied*, 400 U.S. 854 (1970), we held that since deportation proceedings are civil and not criminal in nature "the [exclusionary] rules laid down in *Massiah v. United States*, 377 U.S. 201, 84 S.Ct. 1199, 12 L.Ed.2d 246 (1964) and *Escobedo v. Illinois*, 378 U.S. 478, 84 S.Ct. 1758, 12 L.Ed.2d 977 (1964) requiring the presence of counsel during interrogation, and other Sixth Amendment safeguards, are not applicable to such proceedings."

Thus, as a result of the majority's decision in the Sandoval-Sanchez matter, an alien in the Ninth Circuit does not have the same fifth and sixth amendment rights of a person facing federal criminal prosecution, but does have the same criminal safeguards

available under the fourth amendment. This paradoxical state of the law can only lead to confusion amongst those persons required to follow, enforce, or apply the law as we see it or make it.

The majority also briefly directs our attention to *United States ex. rel. Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923) wherein the Supreme Court stated: "It may be assumed that evidence obtained by the Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings." In *Bilokumsky*, however, the Court concluded that appellant's claim that evidence used against him was obtained by an illegal seizure was unfounded. *Id.* at 155. Thus, the passage from *Bilokumsky* relied upon by the majority is, at best, dictum. The statement, moreover, appears to have been made for the purposes of disposing of other issues. Indeed, other language in *Bilokumsky* casts doubt as to whether the Court would have invalidated the deportation proceedings had the evidence been seized illegally. The Court, in discussing the admissibility of an alien's statements, made the following observation:

[S]ince deportation proceedings are in their nature civil, the rule excluding involuntary confessions could have no application. *Newhall v. Jenkins*, 2 Gray, 562, 563. Moreover, a hearing granted does not cease to be fair, merely because rules of evidence and procedure applicable in judicial proceedings have not been strictly followed by the executive; or because some evidence has been improperly rejected or received. *Tang Tun v. Edsell*, 223 U.S. 673, 681. To render a hearing unfair the defect, or the practice complained of, must have been such as might have led to a de-

nial of justice, or there must have been absent one of the elements deemed essential to due process.

Id. at 157 (footnotes omitted) (emphasis added).

Bilokumsky was decided in 1923. Thirty-seven years later in *Abel v. United States*, 362 U.S. 217 (1960) the Supreme Court, with reference to the scope of valid warrantless searches, stated: "According to the uniform decisions of this Court deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions." *Id.* at 237. No reference was made to the contrary assumption posited in *Bilokumsky*. Whatever meagre precedential value could be found in the assumption made by the Supreme Court in *Bilokumsky* has surely been totally depreciated by the more recent comments of the Court in *Abel* concerning the nonapplicability of certain constitutional safeguards in civil deportation proceedings. See *Abel*, 362 U.S. at 237.

The only recent case cited by the majority that has expressly held that the exclusionary rule should apply to civil deportation proceedings is *Wong Chung Che v. INS*, 565 F.2d 166 (1st Cir. 1977). *Wong Chung Che* in turn relied on the dictum or assumption contained in *Bilokumsky*. 565 F.2d at 169. The decision in *Wong Chung Che* is also not persuasive.

First, as noted above, the assumption made by the Supreme Court in *Bilokumsky* concerning the admissibility of illegally seized evidence in deportation proceedings is entitled to little weight. Whatever persuasive effect it might have once had has been erased by *Abel*.

Second, the court in *Wong Chung Che* totally ignored recent decisions of the Supreme Court in *United*

States v. Calandra, 414 U.S. 338 (1974) and *United States v. Janis*, 428 U.S. 433 (1976). Thus, the Court in *Wong Chung Che* did not attempt to balance the potential benefits and costs of the rule as applied in the context of civil deportation proceedings as required by *Janis* and *Calandra*. We are bound to follow the decisions of the Supreme Court and free to reject cases from other circuits that fail to do so.

Third, the Court in *Wong Chong Che* failed to discuss, or at least attempt to distinguish, those cases such as *Boyd v. United States*, 116 U.S. 616 (1886) and *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965), in which the United States Supreme Court appears to limit the application of the exclusionary rule to criminal trials or quasi-criminal proceedings.⁵

Finally, *Wong Chong Che* relies on a statement from an immigration treatise that the exclusionary rule applies in civil deportation proceedings.⁶ The cases cited by the treatise do not support this proposition.⁷

⁵ See also n.1 *supra*, and n.9-10, *infra*.

⁶ *Wong Chung Che*, 565 F.2d 166, 169 (1st Cir. 1977) (citing 1A C. Gordon and H. Rosenfield, *Immigration Law and Procedure* § 5.2.C at 5-31 (1976)).

⁷ No case cited in support of this principle includes a holding in this regard or resulted in any exclusion of evidence from a deportation proceeding. See *Roa-Rodriguez v. United States*, 410 F.2d 1206 (10th Cir. 1969); *Klissas v. INS*, 361 F.2d 529 (D.C. Cir. 1966); *United States v. Montez-Hernandez*, 291 F. Supp. 712 (E.D. Cal. 1968).

The majority also refers to Fragomen, *Procedural Aspects of Illegal Searches and Seizure in Deportation Cases*, 14 San Diego L. Rev. 151, 163 (1976) (now well established that exclusionary rule applies despite universal characterization of deportation as civil proceedings). Except for the citation to

In each of the cases relied upon by the majority in support of its extension of the exclusionary rule to civil deportation cases, *papers* had been seized in a warrantless search. No court has extended the exclusionary rule to *oral statements* made following an illegal arrest. *Wong Chung Che* has interpreted *Bilokumsky* as suggesting that it ought *not* be extended to oral statements. 565 F.2d at 168-69.*

Wong Chung Che v. INS, 565 F.2d 166 (1st Cir. 1977), the author relies on dicta, e.g., *Bilokumsky v. Tod*, 263 U.S. 149 (1923); *Vlissidis v. Anadell*, 262 F.2d 398 (7th Cir. 1959) and cases that do not include a holding to this effect, e.g., *Matter of Gonzalez*, 16 I&N Dec. 44 (BIA 1976) (dicta; court noted even if arrest defective, subsequent deportation proceeding would not be unlawful); *Matter of Davila*, 15 I&N Dec. 781 (BIA 1976) (court did not suppress evidence); *Matter of Tsang*, 14 I&N Dec. 294 (BIA 1973) (denied motion to suppress because petitioner did not meet burden of proof; court did not address whether exclusionary rule applied); *Matter of Methure*, 13 I&N Dec. 522 (BIA 1970) (arrest valid; therefore court did not address applicability of exclusionary rule); *Matter of Au, Yim & Lam*, 13 I&N Dec. 294 (BIA 1969) (same); *Matter of Chen*, 12 I&N Dec. 603 (BIA 1968) (same). *In the Matter of D-M-*, 6 I&N Dec. 726 (BIA 1955) (motion denied).

* In *Wong Chung Che*, 565 F.2d at 166, one of the petitioners, Wong Pui Tong, alleged that he had been illegally arrested and searched and that his Crewman's Landing Permit had been seized from his home without his consent or a search warrant. Wong Pui Tong sought inter alia "an evidentiary hearing to determine whether either the arrest or the search was illegal and whether evidence taken during either the arrest or search was improperly introduced into [his] . . . deportation proceeding." *Id.* at 167. The court concluded that an illegal arrest does not invalidate a deportation proceeding; however, evidence secured by an illegal search is inadmissible at a deportation proceeding. *Id.* at 168-69. In discussing the admissibility of incriminating statements the court in *Wong Chung Che* observed: "While wide latitude is permitted the

Thus, it should be noted that the majority erroneously states that the First Circuit held in *Wong Chung Che* "that evidence obtained in an illegal search by INS agents is inadmissible in a deportation proceeding." (Maj. Op. 8). In fact, the court held that *physical* evidence so seized would be inadmissible. Oral statements, such as those obtained from Sandoval-Sanchez and Lopez-Mendoza apparently would be *admissible* in the first circuit, contrary to the holding of the majority in the instant matters.

II.

A.

I begin my substantive analysis of the wisdom of extending the exclusionary rule to civil deportation proceedings with the Supreme Court's observation that "[d]espite [the] broad deterrent purpose" of the rule, the Court has never interpreted it "to proscribe the use of illegally seized evidence in all proceedings or against all persons." *United States v. Calandra*, 414 U.S. 338, 348 (1974). Accordingly, "[i]n the complex and turbulent history of the rule, the [Supreme] Court has never applied it to exclude evidence from a civil proceeding, federal or state." *Janis*, 428 U.S. at 447 (footnote omitted).⁹

government in introducing statements of arrested suspects whether or not they might be suppressed in a criminal proceeding, we can think of no justification by necessity for encouraging illegal searches of premises." *Id.* at 169 (footnote omitted).

⁹ In a footnote, the Court explained that the exclusionary rule had been applied in civil forfeiture proceedings because they are characterized as quasi-criminal in nature. *United States v. Janis*, 428 U.S. 433, 477 n.17 (1978). See also note

The exclusionary rule is a "remedial device," and its application "has been restricted to those areas where its remedial objectives are thought most efficaciously served." *Janis*, 428 U.S. at 447 (quoting *United States v. Calandra*, 414 U.S. 338, 348 (1974)). Consequently, the Court has confined standing to invoke the rule to "situations where the Government seeks to use such evidence to incriminate the victim of the unlawful search." *United States v. Calandra*, 414 U.S. at 348 (citing *Brown v. United States*, 411 U.S. 223 (1973); *Alderman v. United States*, 394 U.S. 165 (1969); *Wong Sun v. United States*, 371 U.S. 471 (1963); *Jones v. United States*, 362 U.S. 257 (1960)); accord *Stone v. Powell*, 428 U.S. 465, 488 (1976). This standing requirement "is premised on a recognition that the need for deterrence and hence the rationale for excluding the evidence are strongest where the government's unlawful conduct would result in imposition of a criminal sanction on the victim of a search." 414 U.S. at 348.¹⁰

1 *supra*. *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693 (1965) illustrates the application of the rule to quasi-criminal proceedings. There, the Court relied on *Boyd's* holding that evidence obtained in violation of the fourth amendment may not be utilized to sustain a forfeiture. The Court drew upon the *Boyd* Court's observation that "a forfeiture proceeding is quasi-criminal in character." 380 U.S. at 700. The forfeiture proceeding's object, "like a criminal proceeding, is to penalize for the commission of an offense against the law." *Id.* The Court, comparing the similarities between the penalties imposed as a result of both proceedings, concluded that "forfeiture is clearly a penalty for the criminal offense and can result in even greater punishment than the criminal prosecution. . . ." *Id.* at 701.

¹⁰ That the Supreme Court has confined application of the exclusionary rule to situations where the government is seek-

To determine whether to extend the exclusionary rule to civil deportation proceedings, a balancing ap-

ing to impose a criminal penalty, *e.g.*, *Calandra*, 414 U.S. at 348, is consistent with the court's historical application of the rule. In *Boyd*, where the rule had its inception, the Court explained the "intimate relation" between the fourth and fifth amendments. 116 U.S. at 633. In the Court's view, the two amendments "throw great light on each other" because:

[t]he "unreasonable searches and seizures" condemned in the Fourth Amendment are almost always made for the purpose of compelling a man to give evidence against himself, which in criminal cases is condemned in the Fifth Amendment; and compelling a man "in a criminal case to be a witness against himself," which is condemned in the Fifth Amendment, throws light on the question as to what is an "unreasonable search and seizure" within the meaning of the Fourth Amendment. And we have been unable to perceive that the seizure of a man's private books and papers to be used in evidence against him is different from compelling substantially him to be a witness against himself. We think it is within the clear intent and meaning of those terms.

* * * * *

Id.

In *Gouled v. United States*, 255 U.S. 298 (1921), the Court again construed the fourth and fifth amendments together. Citing *Boyd*, the court answered affirmatively the questions: (1) whether a secret taking of paper violated the fourth amendment; and (2) whether introduction of this paper into evidence against the same person who has been indicted for a crime violates the fifth amendment. To permit the papers seized during an unconstitutional search to be used in evidence, in the Court's view, would compel the defendant to be a witness against himself in a criminal case. *Id.* at 306-07. See also *Agnello v. United States*, 269 U.S. 20, 33-34 (1925) (it is well settled that when properly invoked, the fifth amendment protects every person from being incriminated by the use of evidence obtained through a search or seizure

proach must be applied. *Calandra*, 414 U.S. at 350; *accord United States v. Janis*, 428 U.S. 433, 446-47 (1976). The Supreme Court has explained that the balancing process to be applied "is expressed in the

made in violation of that person's rights under the fourth amendment).

In 1914, the Court held that for the first time "the Fourth Amendment alone may be the basis for excluding from a federal criminal trial evidence seized by a federal officer in violation solely of that Amendment." *Janis*, 428 U.S. at 443 (citing *Weeks v. United States*, 232 U.S. 383 (1914)). Again, in *Walder v. United States*, 347 U.S. 62, 64-65 (1954) the Court, citing *Weeks*, affirmed the notion that the government cannot violate the fourth amendment and use the fruits of such unlawful conduct to secure a conviction.

In 1969, the Court restricted application of the rule, and declined to extend it to one who was not the victim of the unlawful search. The Court stressed that "[t]he deterrent values of preventing the incrimination of those whose rights the police have violated have been considered sufficient to justify the suppression of probative evidence even though the case against the defendant is weakened or destroyed. We adhere to that judgment." *Alderman v. United States*, 394 U.S. 165, 174-75 (1969) (emphasis added).

This principle was reaffirmed in 1974 in *Calandra*. There, the Court explained that standing to invoke the rule had been confined to situations where the government seeks to use evidence to incriminate the victim of the government's unlawful conduct. 414 U.S. at 348. The Court reasoned that under the exclusionary rule—"adopted to effectuate the Fourth Amendment right of all citizens . . . to be secure . . . against unreasonable searches and seizures, . . . evidence obtained in violation of the Fourth Amendment cannot be used in a criminal proceeding against the victim of the illegal search and seizure." 414 U.S. at 347 (citations omitted). *See also Stone v. Powell*, 428 U.S. 465, 488 (1976) ("[s]tanding to invoke the exclusionary rule has been found to exist only when the Government attempts to use illegally obtained evidence to incriminate the victim of the illegal search.") (citations omitted).

contours of the standing requirement.” *Calandra*, 414 U.S. at 348; accord *Stone v. Powell*, 428 U.S. at 488. Thus, the Court has applied the exclusionary rule to proceedings that would result in the possibility of criminal sanctions upon the victim of the illegal search and seizure.¹¹ See *Calandra*, 414 U.S. at 351. In such situations, the need for the rule’s deterrent value is greater than its attendant social costs.

Our task then is to examine the function and purpose of civil deportation proceedings to determine whether the use of evidence unlawfully seized is likely to result in the imposition of a criminal sanction upon the victim of an illegal search. See *Calandra*, 414 U.S. at 348. See also *Stone v. Powell*, 428 U.S. 465, 488 (1976) (standing to invoke the exclusionary rule has been found to exist only when government attempts to use illegally obtained evidence to incriminate the victim of the illegal search). If so, the need for the deterrent value of the exclusionary rule will be strongest, and concomitantly, the potential deterrent effect of the rule will be substantial. If the civil proceedings will not result in a criminal sanction there will be less necessity for the

¹¹ In *United States v. Calandra*, 414 U.S. 339 (1974), the petitioner had been subpoenaed by a grand jury to answer questions concerning evidence seized during the search of his business at an earlier date. The petitioner moved for suppression and return of the seized evidence on the ground that the search exceeded the scope of the warrant. *Id.* at 340-41. The district court granted the motion, and the Sixth Circuit affirmed, holding that the exclusionary rule may be invoked by a witness before the grand jury to bar questioning based on evidence obtained in an unlawful search and seizure. *Id.* at 341-42. The Supreme Court reversed, holding that the exclusionary rule is not applicable in grand jury proceedings. *Id.* at 342.

rule's deterrent effect. Thus, in such circumstances, it is not likely that that rule's remedial objectives will be most effectively served. Consequently, the social costs of extending the rule, including the impact of the rule on the role and function of the proceeding, will take on far greater significance in the balancing process.

Calandra amply illustrates that courts seeking to apply the exclusionary rule in non-criminal contexts must consider the nature of the proceeding in balancing the exclusionary rule's deterrent effect against its cost to society. There, the Court discussed, at length, the role and historic function of the grand jury. 414 U.S. at 343-47. In determining whether to extend the rule to grand jury proceedings, the Court asserted that "we must weigh the potential injury to the historic role and functions of the grand jury against the potential benefits of the rule as applied in this context." *Id.* at 349. The Court emphasized that the grand jury traditionally has been allowed to function unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial because the grand jury does not finally adjudicate guilt or innocence. *Id.* Because adopting the exclusionary rule in this context would disrupt and delay grand jury proceedings, the court declined to extend the rule. *Id.* at 349-50.¹²

¹² The *Calandra* Court distinguished *Silverthorne Lumber Co. v. United States*, 251 U.S. 385 (1920), which involved a petitioner who had successfully sought to exclude evidence before a grand jury proceeding, on the ground that he had previously been indicted and therefore had standing as a criminal defendant to invoke the exclusionary rule. *United States v. Calandra*, 414 U.S. 338, 352 n.8 (1974). The *Calandra* Court also noted that in *Silverthorne* there had been an

In spite of the majority's suggestion to the contrary, (Maj. Op. at 12 n.9) *Janis* does not displace an analysis that considers the purpose of the proceedings in attempting to balance the rule's deterrent effect and cost to society. In *Janis*, the question was whether the petitioner, who had successfully suppressed illegally seized evidence in a state criminal trial, should be allowed to have the same evidence suppressed in a subsequent civil federal tax proceeding. The *Janis* Court simply was not asked to determine whether the rule should be extended to all federal civil tax proceedings. The Court, therefore, was not required to consider the nature of civil tax proceedings. The only question in *Janis* was whether any additional deterrent effect could be gained from extending the rule to a subsequent civil federal tax proceeding.

I disagree with the majority's assertion that the *Janis* court "employed an analysis that does not foreclose application of the exclusionary rule in *all* civil proceedings." (Maj. Op. 10). (footnote omitted) (emphasis added). The question the Court left open in *Janis* is whether the exclusionary rule should be extended to a subsequent civil proceeding where the officers who conducted an unreasonable search and seizure are the agents of the same sovereign that unsuccessfully sought to use the evidence in a prior criminal proceeding. See *Janis*, 428 U.S. at 455 n.31. That issue is not presented by these appeals.

earlier judicial deterrmination that the search and seizure was illegal. *Id.* Consequently, *Silverthorne's* application of the exclusionary rule in the subsequent grand jury proceeding did not disrupt the grand jury function or interfere in its investigative functions. *Id.*

On the other hand, the similarities between the instant case and *Calandra* present helpful analogies in considering the appropriateness of applying the exclusionary rule to civil deportation proceedings.¹³ Accordingly, I next examine the historic role and function of civil deportation proceedings.

B.

Historically, the Supreme Court has long recognized that the responsibility for regulating the relationship between the United States and aliens has been committed to the political branches of the federal government. *Mathews v. Diaz*, 426 U.S. 67, 81 (1976) (footnote omitted). See also *Galvan v. Press*, 347 U.S. 522, 531 (1954) ("that the formulation of policies [pertaining to the entry of aliens and their right to remain here are] entrusted exclusively to Congress has become about as firmly imbedded in the legislative and judicial tissues of our body politic as any aspect of our government"); *Turner v. Williams*, 194 U.S. 279, 289-90 (1904) ("Repeated decisions of this Court have determined that Congress has the power . . . to establish regulations for [excluding] such aliens as have entered in violation of

¹³ Neither deportation proceedings nor grand jury hearings involve an adversarial determination of guilt or innocence. Further, we are asked by persons who lack the traditional standing of criminal defendants to apply the rule to all proceedings involving civil deportation, just as the Court in *Calandra* was asked to do with respect to grand jury proceedings. Given these similarities, we are bound to consider, in the balancing process mandated by *Calandra*, the "historic function and role" of the civil deportation proceedings. *Accord Stone v. Powell*, 428 U.S. 465, 488 (1976) (policies behind exclusionary rule are not absolute but must be evaluated in light of competing policies).

law, and to commit the enforcement of such conditions and regulations to executive officers. . . ."); *Nishimura Ekiu v. United States*, 142 U.S. 651, 659 (1892) (the constitution confers upon the political department of government the power to exclude and expel aliens).

This recognition is premised on the view that: [A]ny policy toward aliens is vitally and intricately interwoven with contemporaneous policies in regard to the conduct of foreign relations, the war power, and the maintenance of a republican form of government. Such matters are so exclusively entrusted to the political branches of government as to be largely immune from judicial inquiry or interference. [citations].

Harisiades v. Shaughnessy, 342 U.S. 580, 588-89 (1952); accord *Kleindienst v. Mandel*, 408 U.S. 753, 765-67 (1972).

The breadth of this power is reflected in numerous Supreme Court decisions. As we noted in *Adams v. Howerton*, 673 F.2d 1036, 1041-42 (9th Cir.), cert. denied, — U.S. —, 102 S.Ct. 3494 (1982), the Supreme Court has upheld the broad power of Congress to determine immigration policy in the face of challenges based on the first amendment, *Kleindienst v. Mandel*, 408 U.S. 753 (1972) (statutory exclusion of individuals advocating world communism); the due process clause, *Boutilier v. INS*, 387 U.S. 118 (1967) (vague statutory language excluding homosexuals); as well as the equal protection component of the fifth amendment due process clause and constitutionally implied fundamental rights, *Fiallo v. Bell*, 430 U.S. 787 (1977) (discrimination based on sex and illegitimacy and denial of fundamental constitutional interest in family relationships).

This court also quoted with approval the principle set forth in *Fiallo v. Bell*, that in the exercise of its broad power over immigration and naturalization, "[C]ongress regularly makes rules that would be unacceptable if applied to citizens." 430 U.S. at 792 (quoting *Mathews v. Diaz*, 426 U.S. 67, 80 (1976)). See also *Harisiades v. Shaughnessy*, 342 U.S. 580, 586 (1952) (footnote omitted) ("Under our law, the alien in several respects stands on equal footing with citizens, but in others has never been conceded legal parity with the citizen").

The Supreme Court has recently noted that undocumented aliens may be treated differently in terms of their entitlement to state benefits. See, e.g., *Plyler v. Doe*, — U.S. —, 102 S.Ct. 2382, 2396 (1982) ("Persuasive arguments support the view that a State may withhold its beneficiaries from those whose very presence within the United States is the product of their own unlawful conduct"). The Court rejected the notion that undocumented aliens are a suspect class because "[w]ith respect to the actions of the federal government, alienage classifications may be intimately related to the conduct of foreign policy, and to the prerogative power to control access to the United States, and to the plenary Federal power to determine . . . who . . . [may] become a citizen of the Nation." *Id.* at n.19.

The law is equally well established that deportation, however severe its consequences, is not punishment for a crime, and that deportation proceedings are not penal in nature. E.g., *Mahler v. Eby*, 264 U.S. 32, 39 (1924) ("[i]t is well settled that deportation, while it may be burdensome and severe for the alien, is not punishment") (citing *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893)). Rather,

deportation has been characterized by the Court as a regulatory proceeding for the purpose of terminating residence. *Mrvica v. Esperdy*, 376 U.S. 560, 568 (1964). See also *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913) (deportation is "simply a refusal by the government to harbor persons whom it does not want"; it is not punishment; even though the determination by facts might constitute a crime under local law, it is not a conviction of a crime); *Li Sing v. United States*, 180 U.S. 486, 494-95 (1901) ("[t]he order of deportation is not punishment for a crime[;] it is not banishment [the alien is not] deprived of life, liberty or property, without due process"). Cf. *Helvering v. Mitchell*, 303 U.S. 391, 399 & n.2 (1938) (an example of a remedial sanction that is free from the characteristic of "the punitive criminal element" is the deportation of aliens).

This Circuit has also recognized that deportation proceedings are not penal but, rather, regulatory in nature. See, e.g., *Ramirez v. INS*, 550 F.2d 560, 563 (9th Cir. 1977) (deportation hearing is civil, not criminal in nature); *Trais-Hernandez v. INS*, 528 F.2d 366, 368 (9th Cir. 1975) (although the consequences of deportation may be severe, the civil nature of the proceeding has been consistently upheld) (citing *United States v. Gasca-Kraft*, 522 F.2d 149, 152 (9th Cir. 1975) and *Chavez-Raya v. INS*, 519 F.2d 397, 400-01 (7th Cir. 1975)); *Lavoie v. INS*, 418 F.2d 732, 734 (9th Cir. 1969) (the presence of counsel during interrogation and other sixth amendment safeguards are not applicable to deportation proceedings because these cases are civil rather than criminal in nature and the rules for the latter are inapplicable to deportation proceedings), *cert. denied*, 400 U.S. 854 (1970).

Thus, because deportation proceedings are not viewed as imposing a criminal sanction, uniform decisions of the Supreme Court hold that "deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions." *Abel v. United States*, 362 U.S. 217, 237 (1960).¹⁴ See also *Galvan v. Press*, 347 U.S. 522, 531 (1954) (*ex post facto* clause has no application to deportation); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952) (in rejecting an *ex post facto* challenge to a provision of the immigration law, the Supreme Court responded that the *ex post facto* provision forbids penal legislation which imposes or increases criminal punishment for conduct lawful previous to its enactment but that deportation, however severe its consequences, has been consistently classified as a civil rather than a criminal proceeding); *Helvering v. Mitchell*, 303 U.S. 391, 399 & n.2, 402 (1938) (where a remedial sanction imposed, such as deportation of aliens, the accepted rules and the constitutional guaranties governing the

¹⁴ This is not to say that aliens who claim to be citizens are not entitled to notice and an opportunity to be heard to determine their status. To be sure, "aliens who have once passed through our gates, even illegally, may be expelled only after proceedings conforming to traditional standards of fairness encompassed in due process of law" *Shaughnessy v. United States*, 345 U.S. 206, 212 (1953). The question then is whether the manner in which Congress has exercised its right to exclude or expel aliens is consistent with the Constitution. *Id.*

Where, however, a civil deportation statute exacts a penalty but does not provide for criminal safeguards, the act is unconstitutional. See, e.g., *Wong Wing v. United States*, 163 U.S. 228, 237 (1896) (if in addition to deportation, aliens are subjected to infamous punishment at hard labor or confiscation of property, then legislation, to be valid, must provide for a jury trial to establish guilt of accused).

trial of criminal prosecutions do not apply to the civil proceeding); *Carlson v. Landon*, 342 U.S. 524, 546 (1952) (the eighth amendment does not require bail in deportation proceedings); *Bilokumsky v. Tod*, 263 U.S. 149, 157 (1923) (since deportation proceedings are in their nature civil, the rule excluding involuntary confessions may have no application); *United States ex rel Turner v. Williams*, 194 U.S. 279, 290 (1904) (an alien who is found to be here in violation of the law and deported is not deprived of liberty without due process of law and the provisions of the Constitution securing the right to trial by jury have no application) (citing *Chae Chan Ping v. United States*, 130 U.S. 581 (1889)); *Li Sing v. United States*, 180 U.S. 486, 494-95 (1901) (deportation is not punishment and provisions of the Constitution securing trial by jury and prohibiting unreasonable searches and seizures have no application).

Our Circuit has followed this view until today. See, e.g., *Martin-Mendoza v. INS*, 499 F.2d 918, 922 (9th Cir. 1974) (the sixth amendment's guarantee of the right to counsel is not applicable to deportation proceedings), *cert. denied*, 419 U.S. 1113 (1975); *Lavoie v. INS*, 418 F.2d 732, 734 (9th Cir. 1969) (deportation proceedings are civil in nature, therefore presence of counsel during interrogation and other sixth amendment rights are inapplicable), *cert. denied*, 400 U.S. 854 (1970). Other circuits, too, follow this rule. *Rodriguez-Fernandez v. Wilkinson*, 654 F.2d 1382, 1386 (10th Cir. 1981) (a deportation proceeding is not penal in nature and normal criminal rights are inapplicable; thus aliens may be arrested by administrative warrant issued without an order of the magistrate and may thereafter be held without bail) (citing *Abel v. United States*, 362 U.S. 217 (1960); *Carl-*

son v. Landon, 342 U.S. 524 (1952)); *United States ex rel. Circella v. Sahli*, 216 F.2d 33 (7th Cir. 1954) (deportation proceedings are not criminal, therefore petitioners could not challenge the act on eighth amendment grounds or on grounds that the act complained of constituted an *ex post facto* law).

Were we writing on a clean slate, perhaps we would debate as an original proposition the doctrine that deportation proceedings are not penal in nature, and therefore criminal safeguards are inapplicable, "but [it] [has] been considered [a] closed [subject] for many years and a body of statute [sic] and decisional law has been built upon [it]." *Harisiades v. Shaughnessy*, 342 U.S. at 594. The majority's ruling contravenes this historical precedent.

III.

A.

As noted earlier, in determining whether to extend the exclusionary rule to a civil proceeding, *Calandra* requires us to weigh the potential injury to the historic role and functions of the proceeding in question against the potential benefits of the rule if applied in this context. *Calandra*, 414 U.S. at 349. See also *Stone v. Powell*, 428 U.S. 465, 488 (1976) (policies behind exclusionary rule are not absolute but must be evaluated in light of competing policies).

In *Calandra*, the Court concluded that the exclusionary rule would seriously impede the grand jury. In declining to extend the rule, the Court reasoned that the grand jury traditionally has been allowed to pursue its investigative and accusatory functions unimpeded by the evidentiary and procedural restrictions applicable to a criminal trial because the grand

jury does not finally adjudicate guilt or innocence. 414 U.S. at 349-50. "Suppression hearings would halt the orderly progress of an investigation and might necessitate extended litigation of issues only tangentially related to the grand jury's primary objective." *Id.* at 349 (footnote omitted). The probable result, in the Court's view, would be a protracted interruption of the proceedings, and, in some cases, the delay might be fatal to the enforcement of the criminal law. As an example, the Court pointed out that two and one-half years had elapsed since the respondent in *Calandra* had been summoned to appear, and noted the possibility that this delay could have completely frustrated the investigation. *Id.* at 349-50 & n.7.

After concluding that application of the exclusionary rule would unduly interfere with the effective and expeditious discharge of the grand jury's duties, the Court weighed, as against this potential injury, the possible benefits to be derived from the proposed extension. The Court reasoned that, while in a criminal trial suppression of illegally seized evidence "is thought to be an important method of effectuating the Fourth Amendment, . . . it does not follow that the Fourth Amendment requires adoption of every proposal that might deter police misconduct." *Id.* at 350.

The Court reasoned that any incremental deterrent effect that might be achieved by extending the rule to grand jury proceedings was "uncertain at best." *Id.* at 351. The Court therefore "decline[d] to embrace a view that would achieve a speculative and undoubtedly minimal advance in the deterrence of police misconduct at the expense of substantially impeding the rae of the grand jury." *Id.* at 351-52 (footnote omitted).

The analysis employed in *Calandra* compels the same conclusion in the instant case. Civil deportation proceedings do not involve determinations of guilt or innocence of a *criminal* offense. For this reason, the evidentiary and procedural restrictions applicable to criminal trials have not been extended to civil deportation proceedings. Further, suppression hearings could result in protracted interruption of the proceedings, and may seriously impede enforcement of our nation's immigration laws.

While the exact number is uncertain, it has been estimated that there are nearly five million illegal aliens in this country. See Note, *The Exclusionary Rule in Deportation Proceedings: A Time For Alternatives*, 14 J. Int'l L. & Econ. 349, 350 (1980). In 1981, immigration officers apprehended 975,780 illegal aliens. U.S. Depart. of Justice, INS Report of Field Operations (1981) (Form G-23.18). The vast majority had their cases disposed of without exercising their right to have their status determined at a formal hearing. Of those arrested, 773,681 voluntarily waived their right to a hearing and were returned to their own country. *Id.* at G-23.8. The balance exercised their right to have their status determined by an immigration judge at a deportation hearing.

The effect of the majority's decision to extend the exclusionary rule to deportation hearings will be to encourage aliens to demand a formal deportation hearing—not to attempt to establish that they are lawfully in the United States—but to challenge the legality of the *officer's* conduct. Currently, approximately forty immigration judges preside over deportation hearings. See Levinson, *A Specialized Court for Immigration Hearings and Appeals*, 56 Notre Dame Law, 644, 644 (1981). If each alien is entitled to a

suppression hearing, the United States may have to increase the number of immigration judges drastically. Additional funding would then have to be found for hearing rooms and support personnel.

The majority has failed to consider the fact that in federal criminal proceedings, *each* accused person appears before a judicial officer. The federal criminal justice system is constructed so as to give defendants their day in court on any issue they may lawfully wish to raise. There is no procedure by which guilty defendants can be punished without appearing in court. The United States district courts returned 27,367 indictments in 1981. Annual Report of Director of Administrative Office, A-56 (1981). Every accused person who was apprehended in connection with these indictments appeared before a judge. If each defendant chose to make a suppression motion, judicial officers would have been available to consider its merits.

By contrast, immigration judges are not now required to give each alien his or her day in court, if the appearance or determination of status is voluntarily waived. Today's decision creates a strong motivation for aliens now illegally in the United States to challenge the admissibility of evidence at a formal civil deportation proceeding, since aliens can remain in the United States until all legal remedies have been exhausted. The majority's decision thus creates a substantial likelihood that immigration judges will be overwhelmed by hearing requests.

To illustrate the delay this new rule may create on deportation matters, consider the facts in the two matters before this court. Elias Sandoval-Sanchez was arrested June 23, 1977. Adam Lopez-Mendoza was arrested August 1, 1976. If these appeals ulti-

mately prove unsuccessful, Sandoval-Sanchez will have extended his illegal presence in this country by almost six years; Mendoza by almost seven years. In *Calandra*, the Court found that this kind of delay illustrated "the force of the argument" that extension of the exclusionary rule might completely frustrate the objective of the grand jury. 414 U.S. at 349 n.7.

The majority believes that its holding "should result in no significant increase in the frequency with which the exclusionary rule is invoked in deportation proceedings." (Maj. Op. 17). My colleagues then speculate that if the rule results in aborted deportation proceedings in one hundred cases a year, "the result would be an increase of less than one one thousandth of one percent in the illegal alien population."

Id. This, the majority concludes, would not be an exorbitant price to pay for effective deterrence of INS misconduct.

The majority's modest prognostications, however, misperceive the problem they have created. The majority's estimate of the impact of the exclusionary rule on deportation hearings is based on its assumption that up to 12 million aliens are here illegally. The number of constitutional challenges that will occur under the majority's new rule must be measured, however, against the number of deportable aliens located. In 1979, that number was 1,076,418. The impact of the rule on deportation proceedings is not so much that the illegal alien population will increase—indeed it does so every year despite heightened enforcement policies. Rather, the impact of the rule on civil deportation proceedings must be measured against the number of motions to suppress that will be made—not the number of constitutional challenges that are meritorious. This is the potential injury to the de-

portation proceeding that must be weighed in the balancing process.

Moreover, it is an integral function of our federal district courts to resolve constitutional questions. In marked contrast, the responsibility of immigration judges in deportation proceedings has been to resolve factual questions concerning the status of an alien, not to resolve constitutional issues. Given the unsuitability of the immigration hearing to the resolution of complex constitutional controversies, the adverse impact that today's decision may have on the civil deportation proceedings cannot be ignored.

In this regard, the BIA's damage assessment should be compelling, as that court, more so than this one, is in a position to anticipate the cost to the system in which it functions. In my view, we should defer to the following judgment:

Absent the applicability of the exclusionary rule, questions relating to deportability routinely involve simple factual allegations and matters of proof. When Fourth Amendment issues are raised at deportation hearings, the result is a diversion of attention from the main issues which those proceedings were created to resolve, both in terms of the expertise of the administrative decision makers and of the structure of the forum to accommodate inquiries into search and seizure questions. The result frequently seems to be a long, confused record in which the issues are not clearly defined and in which there is voluminous testimony, but the underlying facts [are] not sufficiently developed. The ensuing delays and inordinate amount of time spent on such cases at all levels has an adverse impact on the effective ad-

ministration of the immigration laws, which to date (in view of the virtual absence of cases in which evidence has been ultimately excluded) has in no way been counterbalanced by any apparent productive result.

Matter of Sandoval, 17 I&N Dec. 70, 80 (BIA 1979) (footnote omitted).

Although the majority apparently rejects this conclusion, it offers no principled reason for its action other than the observation that it "is not defensible in light of past experience." (Maj. Op. 18 n.19). Presumably, this past experience consists of its estimate that there have been approximately some fifty challenges on fourth amendment grounds since 1952. Certainly, the number of aliens and the number of deportation proceedings have dramatically increased each year since 1952. See 1979 Annual Report of the Immigration and Naturalization Service at 3 (more deportable aliens were apprehended in fiscal year 1979 than in any other fiscal year since 1954); see also *A Program for Effective and Humane Action on Illegal Immigrants* (Jan. 15, 1973) at 6 (in fiscal year 1960, fewer than 30,000 aliens were apprehended, in 1965, the number nearly doubled; in the following five year period, the apprehension figure experienced a 400 percent jump, rising to nearly 280,000 in fiscal year 1970). Given these increases, past experience is not an accurate indicator of the potential injury the exclusionary rule would have on today's deportation proceedings.

At least one study supports this concern. *E.g.*, *A Program Annual Report of the Immigration and Naturalization Service for Effective and Humane Action on Illegal Immigrants* (January 15, 1973) at 16. There, it is stated that "The Immigration Service's

costs for detaining deportable aliens have risen by 74 percent in the past two years, and any policy change which would result in longer periods of detention for greater numbers of aliens could be a serious burden on the Service's resources." *Id.* (footnote omitted) (citing Hearings on Illegal Aliens Before the Subcomm. of the House Comm. on the Judiciary, 92d Cong., 2nd Sess., pt. 5, 1335 (1972)). The majority has not considered the enormous and immediate fiscal impact that its decision may have nor the chaos that may be visited upon our immigration courts. For example, if we were to use 1981 statistics, immigration courts' case loads could rise by over 700,000 matters. The majority has not suggested how this nation in the midst of a recession and faced with a staggering federal budget deficit, will pay the costs of implementing this court's tinkering with the rules of evidence in deportation proceedings.

B.

As noted earlier, *Calandra* instructs us that the need for the exclusionary rule's deterrent effect is strongest in situations where the government's unlawful conduct will result in the imposition of a criminal penalty upon the victim of the unlawful conduct. 414 U.S. at 348. Civil deportation proceedings do not result in the imposition of a criminal sanction, and the government does not seek to use the illegally seized evidence to incriminate the victim of an unreasonable search. Consequently, the need for the exclusionary rule remedy is not strongest in civil deportation proceedings. Indeed, the majority concedes that a plausible explanation for the "paucity" of challenges to the legality of searches in deportation proceedings is that immigration officers commit few unreasonable searches. (Maj. Op. 16).

Another explanation is that the Immigration and Naturalization Service has instituted a comprehensive procedure for the investigation and prosecution of disciplinary actions against immigration officers who are accused of conducting an illegal search and seizure. An immigration officer who is found to have conducted an unconstitutional search is subject to various penalties and disabilities including "removal from his job [,] which may bar him from future federal employment." U.S. Department of Justice, Immigration and Naturalization Service, *The Law of Search and Seizure for Immigration Officers*, 35 (1979) (footnote omitted). Each employee of the INS is required to report any allegation of a violation by an immigration officer of an alien's constitutional rights. See Immigration and Naturalization Service Operations Instructions, 287.10, 4721, 4723.

An employee who fails to report any allegation of a unreasonable search and seizure by an immigration officer is subject to disciplinary action. See *id.* at 4730. The employee is required to report such allegations to his supervisor, district director, chief, patrol agent or officer in charge. *Id.* Deportation proceedings must be suspended upon the filing of such an allegation against an immigration officer. "Whenever an allegation is made by, on behalf of, or involves an alien, no action will be taken to enforce the departure from the United States of either the alien or of any witnesses involved until a preliminary inquiry or an investigation of the matter has been completed." *Id.* at 4730. Depending on the category of the alleged misconduct and the job level of the accused individual a report is then made to the Office of Professional Responsibility or to the Regional Commissioners (or their designee). *Id.* at 4728.

These disciplinary procedures come under the Service Professional Responsibility Program. This program is headed by the Office of Professional Responsibility, which plans, directs and manages "the Service's investigative program concerning allegations or information of criminal, or other misconduct by Service employees." *Id.* at 4721. The program requires that the Office of Professional Responsibility or the regional office immediately upon receiving the report determine "whether or not the alleged offense is prima facie misconduct and whether or not a Service employee is or may be involved." *Id.* at 4731. If it is determined that the allegation did involve misconduct by an INS employee then a preliminary inquiry is to be conducted. *Id.* at 4732. The preliminary hearing is directed by an employee selected by the Director of the Office of Professional Responsibility or a regional commissioner. *Id.* at 4733. "The employee selected to conduct the preliminary inquiry if not a supervisory employee must not be from the same district or sector as the involved employee. Supervisory employees shall not be from the same operating branch as the accused employee." *Id.* The inquiry must be completed and a memorandum report submitted to the Director of the Office of Professional Responsibility or the regional commissioner within ten working days from the date assigned. *Id.* at 4733-34. If the preliminary inquiry supports the allegation of misconduct an investigative hearing is then commenced. *Id.* at 4735-36.

Depending on the degree of the offense or the job level of the accused the investigation will be conducted by a staff officer from the Office of Professional Responsibility or an officer selected by the Regional Commissioners or their designees. *Id.* at 4735-36.

The officer selected by the Regional Commissioners, "if not a supervisory employee, must not be from the same District or Sector as the involved employee. Supervisory employees selected shall not be from the same operating branch as the accused employee." *Id.* at 4736. These investigations must be completed and reports submitted within sixty days of the date the case is assigned. *Id.* at 4737. An extension of time to complete an investigation is only granted for a compelling reason. *Id.* at 4737-38. All investigative reports are reviewed for "sufficiency of the investigation and approved by the Director . . . [of the Office of Professional Responsibility] or by Regional Commissioners *Id.* at 4738. If the allegations are sustained then depending on the seriousness of the offense, the matter may be forwarded to the U.S. Attorney having jurisdiction over the matter or "to the Associate Commissioner, Management, or the Associate Regional Commissioner, Management to assure appropriate corrective action as warranted by designated officials." *Id.* at 4739.

It is readily apparent from reviewing the Immigration and Naturalization Service's disciplinary procedure that a sincere effort is being made to deter and to punish search and seizure violations. A police officer who conducts an unreasonable search and seizure may suffer anguish when a criminal defendant goes free because of his blunder. He does not, however, face the immediate prospect of unemployment as a result of the exclusion of illegally seized evidence. An immigration officer on the other hand, faces loss of his job and denial of future federal employment if he conducts an illegal search and seizure. These stern consequences should serve as a far greater deterrent to improper conduct than the possibility that deporta-

tion proceedings against an alien may be dismissed. No evidence has been cited to this court that these harsh disciplinary measures proved ineffective.

To paraphrase the Supreme Court's cogent statement in *United States v. Caceres*, 440 U.S. 741, 755-57 (1979), where the Court refused to apply exclusionary rule to evidence obtained in violation of an Internal Revenue Service regulation, we should not "ignore the possibility that a rigid application of the exclusionary rule . . . could have a serious deterrent impact on the formulation of additional standards to govern . . . procedures." (footnote omitted). Just as in *Caceres*, "the Executive itself has provided for internal sanctions." *Id.* at 756. To go beyond that, and require the application of the exclusionary rule in deportation proceedings, "would take away from the Executive department the primary responsibility for fashioning the appropriate remedy . . ." to curb unreasonable conduct on the part of its officers. *Id.*

Conceding that self policing should be the most effective deterrent because it offers direct and immediate feedback to the officer, the majority nevertheless concludes that the INS regulations will not be an effective deterrent. (Maj. Op. at 21).

Again, the majority cannot, in the face of a silent record, point to any evidence that INS officers are not obeying the internal regulations which condemn and punish unreasonable searches and seizures. To mask this lack of factual support for its premise, our attention is diverted to the claims of certain legal writers that "the practical experience of other law enforcement agencies indicates that internal review is rarely effective in deterring fourth amendment violations." (Maj. Op. at 25). In the absence of evidence to the contrary, we are required to presume

that immigration officers have lawfully performed their duties. See *FCC v. Schreiber*, 381 U.S. 279 (1965) (administrative agencies are entitled to a presumption that they act properly and according to law); *In re Hergenroeder*, 555 F.2d 686 (9th Cir. 1977) (the government is presumed to obey the law). The majority, without citation to any authority, apparently would reverse this ancient presumption, in the absence of affirmative evidence "that the guidelines are being consistently and effectively enforced." (Maj. Op. 22). I can find no justification in the record—nor in the majority's opinion—for its refusal to apply the rules concerning the legal effect of presumptions to aliens who have entered this country illegally.

As noted previously, the majority has failed to identify any facts which demonstrate that the exclusionary rule is necessary in civil deportation proceedings or that it will serve as a deterrent to INS officers in conducting arrests, searches, and seizures. Rather, the majority relies solely on the assumption made in the criminal context that the exclusionary rule effectively deters police from violating a defendant's fourth amendment rights. While the Supreme Court continues to apply this assumption in criminal cases, it does not follow that it will do so in non-criminal matters. Indeed, the *Janis* court refused to apply the assumption to justify extending the rule to a tax proceeding. The extension of the rule to a federal civil tax proceeding would have been "an unjustifiably drastic action by the courts in the pursuit of what is an undesired and undesirable supervisory role over police officers." 428 U.S. at 458 (citing *Rizzo v. Goode*, 423 U.S. 362 (1976) (footnote omitted)). The Court further stated that:

In the past this Court has opted for exclusion in the anticipation that law enforcement officers would be deterred from violating Fourth Amendment rights. Then, as now, the Court acted in the absence of convincing empirical evidence and relied, instead, on its own assumptions of human nature and the interrelationship of the various components of the law enforcement system. In the situation before us, we do not find sufficient justification for the drastic measure of an exclusionary rule.

Id. at 459.

In my view, *Janis'* message is simply this: those seeking the extension of the rule must demonstrate that there is sufficient justification for the "drastic measure" of the exclusionary rule. *See id.* at 453 n.26 ("we do not mean to imply that more accurate studies could never be developed, or . . . provide us with firmer conclusions. We just do not find that the studies now available provide us with reliable conclusions"). It seems clear to me that since *Janis* the Supreme Court will no longer rely on human assumptions as the basis for applying the exclusionary rule to civil proceedings.

Unlike the field of criminal law, the supervisory role over deportation is committed to the political branches of our government. The power of Congress over the admission of aliens and their right to remain "is necessarily very broad, touching as it does basic aspects of national sovereignty, more particularly our foreign relations and the national security." *Galvan v. Press*, 347 U.S. 522, 530 (1954). The formulation of policies pertaining to the alien's right to remain here are entrusted exclusively to Congress,

and in the enforcement of these policies the Executive Branch must respect the safeguards of due process. *Id.* at 531 (citing *Wong Yang Sung v. McGrath*, 339 U.S. 33, 49 (1950); the *Japanese Immigrant case*, 189 U.S. 86, 91 (1903)). Policy questions concerning the appropriate punishment to be applied for the commission of unreasonable searches and seizures do not come within the safeguards of the due process clause. Thus, these matters should be left to the political branches of government.

CONCLUSION

I would affirm the orders of the BIA on each of these matters. Each appellant failed to make a motion to suppress evidence of his oral statements at his hearing before the immigration judge. The failure to so object constituted a waiver of the right to seek appellate review.

Further, appellants failed to present any evidence which would support an inference that the drastic remedy of excluding relevant evidence of illegal status is required to curb widespread lawless enforcement of our immigration laws. In fact, the majority has forthrightly conceded that there is a "paucity" of widespread, fourth amendment violations in the arrests of aliens who have illegally entered this nation. The Supreme Court has refused to extend the exclusionary rule where there is insufficient evidence that it is required to curb repeated lawless enforcement of the law.

A strong internal deterrent to unreasonable searches and seizures has been devised by the Immigration and Naturalization Service. There is no sound reason for us to undertake the supervision of the conduct of arrests and searches and seizures by immi-

gration officers. This nation cannot afford the added cost to the enforcement of our immigration laws that will surely follow implementation of the majority's new rule of evidence. We should demand a showing of strong justification for the erection of new barriers to effective enforcement of our immigration laws. As the Supreme Court recently observed:

at the least, those who elect to enter our territory by stealth and in violation of our law should be prepared to bear the consequences, including but not limited to, deportation.

Plyler v. Doe, — U.S. —, 102 S.Ct. 2582, 2396 (1982).

As members of the judicial branch of government whose constitutional role is limited to the application of existing law to real cases or controversies, shouldn't we restrain ourselves from the temptation to legislate extreme remedies to correct non-existent problems?

WRIGHT, specially concurring in the dissenting opinion:

Three factors must be weighed before deciding whether to apply the exclusionary rule: the deterrent impact it might have, the societal costs of applying it, and the need for deterrence in the particular setting.

A. *Deterrent Impact*

The Court has evaluated the rule's deterrent impact in light of its "assumptions of human nature and the interrelationship of the various components of the law enforcement system." *United States v. Janis*, 428 U.S. 433, 459 (1976).

In *United States v. Calandra*, 414 U.S. 338 (1974), it held that a grand jury witness could not refuse to answer questions because they were based on information obtained in violation of his Fourth Amendment rights. Because the evidence would be suppressed in a subsequent criminal proceeding, application of the rule "would deter only police investigation consciously directed toward the discovery of evidence solely for use in a grand jury investigation." *Id.* at 351.

In *Janis*, the Court held that evidence seized by a state law enforcement officer in good faith, but nevertheless in violation of the Fourth Amendment, was admissible in a civil proceeding by or against the United States.

Calandra and *Janis* are based on the assumption that the more likely an officer is to gather evidence for use in a specific forum, the greater the deterrent impact from suppressing evidence in that forum. Our decisions reflect this approach.

We have held that the exclusionary rule is inapplicable in probation revocation and subsequent sen-

tencing proceedings where the officer was unaware of the probationer's status. *United States v. Vandemark*, 522 F.2d 1019 (9th Cir. 1975). But we applied the rule in a sentencing hearing where the officers had a personal stake in seeing that a violator was convicted and given a long sentence. *Verdugo v. United States*, 402 F.2d 599, 611-13 (9th Cir. 1968), *cert. denied*, 397 U.S. 925 (1970); see *United States v. Winsett*, 518 F.2d 51, 54 n.5 (9th Cir. 1975).

This suggests there would be a deterrent effect if the rule were applied in deportation proceedings because these proceedings are within immigration officers' zone of primary interest. *Matter of Sandoval*, 17 I & N Dec. 70, 78 (BIA 1979).

In many cases, however, the aliens uncovered through unlawful investigations will be deportable on the basis of evidence in the INS files. The government's burden, in many deportation proceedings, is solely to establish the identity and alienage of the respondent, who has the burden to show time, place, and manner of entry. 8 U.S.C. § 1361. Since "identity" is not subject to suppression, see, e.g., *Wong Chung Che v. INS*, 565 F.2d 166, 168 (1st Cir. 1977), the government could carry its burden, even if unlawfully obtained evidence were suppressed, if it had evidence of alienage in its file. This factor significantly reduces the rule's deterrent impact.

B. Societal Costs

Application of the exclusionary rule may impose significant societal costs. In a deportation proceeding, these costs might include: diverting attention from the "main issues" in deportation proceedings, over-burdening immigration judges, and permitting unlawful aliens to remain in the United States, in

effect "sanctioning . . . a continuing violation of this country's immigration laws." *Matter of Sandoval*, 17 I & N Dec. at 80-81.

If I were persuaded the exclusionary rule would have a significant deterrent impact and that there was a need for deterrence in this setting, societal costs would not cause me to reject its application. They are less onerous than the societal costs imposed by the rule in criminal trials.

When compared with only a minimal deterrent impact, however, these costs raise a serious question whether the exclusionary rule should be applied here. The societal interest in the efficient enforcement of immigration laws may outweigh the potential incremental safeguarding of Fourth Amendment rights.

C. *Need for Deterrence*

The third factor to be considered is the need for deterrence. The primary consideration here is the function performed by the officers sought to be deterred.

The need for deterrence is greatest when we are concerned with the conduct of officers who are armed and have broad and discretionary authority to investigate the commission of crimes and apprehend suspects. The potential for abuse of that authority poses such a substantial threat to the rights guaranteed by the Fourth Amendment that it justifies the extreme remedy of the exclusionary rule.

At the other end of the spectrum, officers with limited powers to investigate compliance with civil, regulatory measures pose a less immediate threat to constitutional rights. Accordingly, the need for the extreme sanction of the exclusionary rule is less compelling. *Cf. Todd Shipyards Corp. v. Secretary of*

Labor, 586 F.2d 683, 689 (9th Cir. 1978) (suggesting exclusionary rule not applicable in OSHA proceedings); *NLRB v. South Bay Daily Breeze*, 415 F.2d 360, 364 (9th Cir. 1969), *cert. denied*, 397 U.S. 915 (1970) (suggesting rule only applicable to criminal or quasi-criminal proceedings).

Immigration and border patrol agents fall somewhere between these two extremes. On one hand, they do enforce criminal laws, they can be armed, and they have broad powers to investigate and arrest persons. When acting as criminal law enforcement agents, they pose a potential threat to Fourth Amendment rights comparable to that posed by other armed police officers.

These agents, however, are also charged with enforcing civil immigration laws. In both of these cases agents were trying to determine whether individuals were deportable aliens. They did not use weapons or threaten violence. They were not seeking to apprehend criminals.

These are not cases in which the manner of seizing evidence was so egregious as to call for the deterrent impact of the rule. *See Ex Parte Jackson*, 263 F. 110 (D. Mont. 1920); *Ramira-Cordova*, A21 095 & 660 (BIA Feb. 21, 1980). In *Ramira-Cordova*, four or five armed agents pounded on the respondents' door at 4:00 A.M. Upon entering, the agents, without warrant, probable cause, or founded suspicion, questioned the occupants, threatened one with violence, pushed another aside, and searched the entire apartment.

In *Jackson*, deportation proceedings were brought against a resident alien who belonged to a controversial labor organization. Seeking to put an end to its activities, federal agents and soldiers "perpetrated a reign of terror, violence, and crime against citizen

and alien alike." 263 F.2d at 112. Under the circumstances, the need for the deterrent impact of the exclusionary rule was overwhelming. The court declared that, even if the alien was a "Red,"

he and his kind are less a danger to America than those who indorse or use the methods that brought him to deportation. These latter are the mob and the spirit of violence and intolerance incarnate, the most alarming manifestation in America today.

Id. at 113.

The conduct of the agents in these cases simply is not comparable to the conduct of the agents in *Ramira-Cordova* or in *Jackson*. In this setting, the function performed by the agents is fairly analogized to the function performed by officers enforcing civil, regulatory measures. As such, the need for deterrence is less than in a case involving criminal law enforcement, or the use or threat of violence.

D. Conclusion

Considering all three factors, I conclude the exclusionary rule should not be applied here. I would hold that where the exclusionary rule would have a minimal deterrent impact, the officers involved were enforcing civil laws in a peaceful manner, and the rule would impose significant societal costs, it should not be applied.

POOLE, Circuit Judge, dissenting:

I join in Judge Alarcon's dissenting opinion and have added my separate thoughts.

The majority's extension of the exclusionary rule to the suppression of oral statements in civil deportation proceedings is particularly inapposite in light of the recent Supreme Court holding in *Florida v. Royer*, — U.S. —, 51 U.S.L.W. 4293 (March 23, 1983).

In the context of a *criminal* prosecution, the plurality opinion of Justice White stated in *Royer*:

* * * [L]aw enforcement officers do not violate the Fourth Amendment by merely approaching an individual on the street or in another public place, by asking him if he is willing to answer some questions, by putting questions to him if the person is willing to listen, or by offering in evidence in a criminal prosecution his voluntary answers to such questions. *See Dunaway v. New York*, 442 U.S. 200, 210 n. 12 (1979); *Terry v. Ohio*, 392 U.S. 1, 31, 32-33 (1968) (Harlan, J., concurring); *id.*, at 34 (White, J., concurring). Nor would the fact that the officer identifies himself as a police officer, without more, convert the encounter into a seizure requiring some level of objection justification *United States v. Mendenhall*, 446 U.S. 544, 555 (1980) (opinion of Stewart, J.). The person approached, however, need not answer any question put to him; indeed he may decline to listen to the questions at all and may go on his way. *Terry v. Ohio*, *supra*, at 32-33 (Harlan, J., concurring); *id.*, at 34 (White, J., concurring). He may not be detained even momentarily without reasonable, objective grounds for doing so; and his refusal to listen or

answer does not, without more, furnish those grounds. *United States v. Mendenhall, supra*, at 556 (opinion of Stewart, J.). * * *

Id. at 4294-95.

The agents in this case did not violate the Fourth Amendment "by merely approaching" the suspected aliens and "by putting questions" to them, first in English and then in Spanish. When the subjects answered and conceded alienage and also illegal entry, the agents were justified in detaining them for they had probable cause to believe them to be in this country illegally. The subsequent reduction of this information to writing as a result of more questioning at the place of detention, added nothing new to the information which the agents had already legally obtained.

The majority makes much of its conclusion that Officer Bower had "no specific recollection" of Sandoval and could not pinpoint the specific conduct which attracted their attention. Eventually the majority concludes that all the observations of the agents, focused or unfocused, were simply patently insufficient to justify even a brief *Terry* stop of Sandoval. This to me appears too cozy. The record as a whole shows that all of the persons to whom questions were addressed first in English and then in Spanish had exhibited some behavior which preceded the questioning. Sandoval was among those asked in Spanish whether "they had papers." He had none. Of the group subsequently transported to the station, some immediately accepted voluntary deportation. Sandoval and Lopez declined. Sandoval willingly an-

swered the questions which are contained in the I-213 form.

In Lopez's case, there was no response to the agent's questions in English made at the transmission shop where he worked. Agent Eddy testified that he questioned Lopez; asked him his name, where he was from, how he entered the United States, about his family ties, "equities" in the United States and from those responses determined that Lopez was in the country illegally. This information was subsequently incorporated in the I-213 form.

If, as the majority states, the connection of Lopez and Sandoval to the attention-tracking conduct observed by the agents is not set forth with sufficient explicitness or detail, the remedy for that omission would be for the court to say that the record lacked that requisite explicitness. In such case there could be proper remand to determine whether indeed these two individuals had been so engaged. Instead, the majority leaps to the adoption of a sweeping exclusionary rule because that is what the majority was all about from the start.

None of the information was ever used against either appellant in any criminal case. The majority ignores this fact. It first treats the case as one of illegal arrest, and then, invoking the authority of criminal cases, pronounces the unavailability in a deportation hearing statements which were voluntarily made.

The majority has reached out to exclude from a civil deportation proceeding evidence which would otherwise have been admissible. The majority believes that deportation proceedings are not really "civil" as we know that term but ought to be classified

on the same level as those which are denominated "criminal." While these two cases furnish a shaky vehicle for the journey from civil to criminal, the majority has had little difficulty convincing its members that the time has come to change the rules on immigration. Even if that were to be the conclusion from a record of documented injustices, no such record exists here. Hence, I dissent.

APPENDIX B

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 79-7673

ADAN LOPEZ-MENDOZA, PETITIONER

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

I&NS# A22 452 208
Northern California

Upon Petition to Review an order of the
Immigration and Naturalization Service

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said Immigration and Naturalization Service in this Cause be, and hereby is VACATED and REMANDED.

Filed and entered: April 25, 1983

Mandate Issued Jun 15, 1983

APPENDIX C

**UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT**

No. 80-7189

ELIAS SANDOVAL SANCHEZ, PETITIONER

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

I&NS# A22-346-925
Washington (Seattle)

Upon Petition to Review an order of the
Immigration and Naturalization Service

JUDGMENT

This Cause came on to be heard on the Transcript of the Record from the Immigration and Naturalization Service and was duly submitted.

On Consideration Whereof, it is now here ordered and adjudged by this Court, that the order of the said Immigration and Naturalization Service in this Cause be, and hereby is REVERSED.

Filed and entered: April 25, 1983

APPENDIX D

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

File: A22 452 208—San Francisco, California

Dec. 21, 1977

IN THE MATTER OF
ADAN LOPEZ MENDOZA, RESPONDENT

IN DEPORTATION PROCEEDINGS

CHARGE: I & N Act—Section 241(a)(2)—entered
without inspection

APPLICATION: Voluntary departure

FOR THE RESPONDENT:

Douglas P. Haffer, Esq.
693 Sutter Street
San Francisco, California 94102

FOR THE SERVICE:

Philip P. Leadbetter, Esq.
Trial Attorney
San Francisco, California

DECISION OF THE IMMIGRATION JUDGE

The respondent contested the jurisdiction of this court and his deportability on the ground that Service officers had unlawfully arrested him by improperly entering upon private property without a warrant and by improperly arresting him without a warrant.

As I stated at the hearing, the contentions are rejected. (pp. 77; 83-84) I need not consider the alleged facts surrounding the respondent's arrest and make findings regarding the legality thereof because the mere fact of an illegal arrest has no bearing on subsequent deportation proceedings. *Matter of Mejia*, Int. Dec. #2527, BIA 9-1-76.

As in *Mejia*, the respondent denied the allegations in the Order to Show Cause and deportability as charged. The Service relied on a Form I-213, Record of Deportable Alien, which was identified by the Service investigator who had prepared it as one he had made in his official capacity as a Service investigator and one which pertained to the respondent. (Exhibit 2) (p. 85) I entered it in evidence without objection by the respondent's counsel. (p. 85) The Service also relied on an affidavit executed by the respondent before the same Service investigator who had prepared the Form I-213. (Exhibit 3) (p. 86) The affidavit was entered in evidence without objection by the respondent's counsel. (p. 86) According to both documents, the respondent was born in Mexico on April 18, 1951, is a citizen thereof, and last entered the United States near San Ysidro, California, in October 1975 without first having been inspected by a United States Immigration Officer. The respondent offered no evidence in refutation and when questioned by the Trial Attorney declined to answer questions asserting that he would follow his counsel's instructions not to answer questions on the issue of deportability on the ground that his answers might tend to incriminate him. (pp. 90-91) Accordingly the information contained in the Record of Deportable Alien and the respondent's affidavit establish that he is a deportable alien as charged in the Order to Show Cause.

The respondent testified fully regarding his eligibility for the privilege of voluntary departure and whether it should be granted to him in the exercise of discretion. He is eligible for the privilege, which I grant him in the exercise of discretion.

APPENDIX E

[SEAL]

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals
Washington, D.C. 20530

Sept. 19, 1979

File: A22 452 208—San Francisco

IN RE: ADAN LOPEZ-MENDOZA

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT:

Douglas P. Haffer, Esq.
901 Battery Street, Suite 308
San Francisco, CA 94111

ON BEHALF OF I&N SERVICE:

Philip P. Leadbetter
Trial Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251(a)(2))—Entered without inspection

APPLICATION: Termination of the proceedings

In a decision dated December 21, 1977, an immigration judge found the respondent deportable as charged and granted him voluntary departure. The respondent appeals from the finding of deportability. The appeal will be dismissed.

The respondent is a 28-year-old male native and citizen of Mexico. He last entered the United States near San Ysidro, California in October of 1975. He was taken into custody by Immigration and Naturalization Service Agents at his place of employment in San Mateo, California, on August 3, 1976. The respondent was afforded a deportation hearing on October 8, 1976.

The record reflects that the Service was advised by an informant that seven illegal aliens were working at Transco in San Mateo, California. A list of seven names was provided. The respondent's name was not one of the seven. On August 3, 1976, two immigration officers went to Transco to investigate. They entered the premises, advised the proprietor of their identity and the fact that they wished to question his employees. The proprietor refused to allow the investigators to question his employees and demanded a court order. One of the agents asked the respondent about his status. The respondent replied that he was from Mexico and had no close family ties in the United States; whereupon, he was taken into custody. Later that day, he provided information from which a "Record of Deportable Alien" (Form I-213) was prepared and he executed an affidavit in which he acknowledged that he was born in Mexico on April 18, 1951, was still a citizen of Mexico, and that he entered the United States in October of 1975 without being inspected by an immigration officer.

At his hearing, the respondent moved to terminate the proceedings on the ground that his arrest was illegal. The immigration judge denied the motion finding the question of the legality of the respondent's arrest to be irrelevant to the deportation proceedings. The "Record of Deportable Alien" (Form I-213) and

the affidavit executed by the respondent were introduced into evidence without objection by the respondent. Based upon this evidence, the immigration judge found the respondent deportable as charged.

On appeal, the respondent contends that his arrest was illegal and that the exclusionary rule must be expanded in order to provide an effective remedy to deportable aliens illegally arrested and also to deter service officers from making illegal arrests. The respondent does not argue for the exclusion of evidence (the Form I-213 and his affidavit). Instead, he wants the proceedings terminated.

The respondent's contentions are without merit. Even if we were to determine that the respondent's arrest was unlawful, he would not be entitled to relief. The mere fact of an illegal arrest has no bearing on a subsequent deportation proceeding. *See Matter of Mejia*, Interim Decision 2527 (BIA 1976) and cases cited therein. We reject the notion that an unlawful arrest can somehow transform an alien's unlawful presence in the United States into a right to remain.

Contrary to the respondent's allegation, the exclusionary rule is not applied in criminal cases to redress the injury into the privacy of the search victim. The Supreme Court has held that the prime, if not sole, purpose of the exclusionary rule is to deter future unlawful police conduct. *United States v. Janis*, 428 U.S. 433, 446 (1976); *United States v. Calandra*, 414 U.S. 338, 347 (1974).

We have recently reviewed the exclusionary rule in detail and declined to apply it in deportation proceedings. *Matter of Sandoval*, Interim Decision 2725 (BIA 1979). We were not convinced that adoption of the rule in deportation proceedings would offer any

significant deterrent to misconduct to an immigration officer who would otherwise intentionally violate an individual's Fourth Amendment rights in the hope of assisting in that alien's deportation. We concluded that the potential benefit of the rule does not justify the societal cost of its application and that other means of deterring immigration officers from unlawful conduct are available.

The immigration judge found the respondent deportable based upon a "Record of Deportable Alien" (Form I-213) and an affidavit executed by the respondent. These records were received into evidence without objection by the respondent. The respondent has not alleged, or submitted any proof, that the Form I-213 or the affidavit contains information that is incorrect or which was obtained by coercion or force. Those documents are clear, convincing, and unequivocal evidence of the respondent's deportability. *See Matter of Mejia, supra.*

Accordingly, the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/ David L. Milhollan
Chairman

APPENDIX F

**UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service**

File: A22 346 925—Seattle (Spokane)

[Oct. 7, 1977]

**IN THE MATTER OF
ELIAS SANDOVAL-SANCHEZ, RESPONDENT**

IN DEPORTATION PROCEEDINGS

CHARGES:

Section 241(a)(2), I and N Act—Entry without inspection.

APPLICATION: Termination of proceedings; in the alternative, voluntary departure in lieu of an order of deportation.

IN BEHALF OF RESPONDENT:

Charles H. Barr, Esq.
P. O. Box 2733
Tri-Cities, WA 99302

IN BEHALF OF SERVICE:

Kenneth D. Bryant
Acting Trial Attorney
Spokane, Washington

DECISION OF THE U. S. IMMIGRATION JUDGE

The respondent is a married male. He denied Allegations Nos. 1, 2, and 4, contained in the Order to

Show Cause. Allegation No. 3 has been admitted with a clarification as to date of entry and amended to show that entry was by foot. The denied allegations assert that he is an alien, native and citizen of Mexico, who entered the United States without inspection. Deportability is denied and Mexico is designated as country of deportation. Voluntary departure has been applied for in the alternative.

Respondent is contending in regard to his denial of deportability that the evidence relied upon by the Government should be suppressed as it is the result of the "fruit of the poisoned tree." He stated that his arrest was unlawful, was without a warrant, and he was not advised of his Miranda rights. Exhibit 3 is a Government form entitled "Record of Deportable Alien" (I-213). This contains certain information on which the Government is endeavoring to establish its case and is the evidence which the respondent claims should be suppressed.

The Government presented a witness, one Investigator Bower. He identified the respondent as being the individual who furnished the information contained on Exhibit 3, the "Record of Deportable Alien" form. In other words, he processed the respondent and questioned him and from information obtained from him completed this form. The witness stated that he had been one of the officers involved in arresting some 37 aliens, including respondent, on the date in question at Roger's Walla Walla in Pasco, Washington. According to his testimony, the Government had obtained no search warrant but permission from the company officials had been obtained in order that Government officials might question some of the company employees. He said that he and a Border Patrol Agent, who was in uniform, first entered the lunch

room of the company and he identified himself. This caused much confusion among the employees in the lunch room because some started heading for the exits and some just stood around. When they went into the plant itself, some headed for the exits, leaving their machines, and some of those coming in turned and started walking away. At some time, the witness and the Border Patrol Agent stationed themselves at a gate where, because of the shift change, people were entering and leaving the company grounds. Some were, he indicated, leaving work for the day and some were going to work. The witness could not recall exactly whether he or the Border Patrol Agent arrested this particular respondent but he was of the belief that possibly he did. His procedure at the location he was holding down, that is, by the gate, was to wait for the people to file by and, if any one of them acted in a furtive manner of some sort, for example, by putting his head down, trying to hide in a group of people, avoiding eye contact, which would make him suspicious, he would then ask simple questions in English and, if there was no response and it was indicated that English could not be spoken or understood, he would ask in Spanish if the particular person had any papers or question that person further or detain him to question at a later time. The respondent testified that he was going to work at the time in question and he was wearing a helmet and a face covering but no apron. The witness testified that some of the people entering or leaving were wearing helmets or aprons, but he did not think that any of them were wearing face masks. The respondent testified that he did not realize that any immigration officials were checking the people but he did see a man in uniform and thought that this man was a police

officer. The witness testified that the processing of the respondent took place after he had already, in the respondent's presence, processed several other couples whom, he indicated, he had advised of their right to counsel. He asked the respondent if he wished to depart voluntarily from the United States or whether he wanted a deportation hearing and the respondent said that he did not want to leave voluntarily. During the time of the processing, the witness testified that the respondent was advised as to his right to counsel but not given full Miranda warnings. The respondent stated that his wife tried to explain something about his rights to him from a piece of paper given to her by the witness or another Government official but he did not understand. He said also that his wife did not understand either. He willingly answered all of the witness's questions put to him, but did say that he did not know that he had a right to remain silent.

Based on this record, I find that the respondent has failed to establish that his arrest was unlawful or illegal. The record sets forth the procedures used by the witness in questioning individuals in situations like the respondent's and procedures used by him on which he derives a reasonable belief or suspicion of alienage from certain articulable facts, other than the mere fact of foreign heritage. The respondent could have at some time during the time in question reacted in a furtive manner in the presence of the officials. This plus foreign appearance would constitute enough articulable facts which would give rise to a suspicion of alienage. After this has been done a Service investigator has the power to interrogate without a warrant any alien as to his right to remain in the United States.

The respondent has failed to prove that this is not what took place in this case. Also, he said that the information given by him was given willingly. Assuming but not conceding that the respondent's arrest was illegal, this does not tend to negate the validity of a deportation hearing. Concerning the Miranda warnings being given to him, the record does reflect that he was advised of his right to counsel, but maybe did not understand. He was not given the other Miranda warnings and he was not aware that he could remain silent. The short answer to this is that a deportation proceeding is civil in nature and not criminal. The Miranda warnings do not come into play. The information that the Government obtained willingly from the respondent was not obtained as a result of the "fruit of the poisoned tree."

Based on Exhibit 3, Allegations 1, 2, and 4 have been established. The respondent was born in Mexico. The burden is on him to prove United States citizenship if he is making this claim or that he is a lawful permanent resident. He has not met this burden. Therefore, he is an alien, a native and citizen of Mexico, who entered the United States without inspection. Allegation No. 3 has been admitted to show that he entered on foot on June 4, 1976, near San Ysidro, California. The respondent is deportable on evidence which is clear, unequivocal, and convincing.

Voluntary departure is applied for in the alternative. The respondent indicated that he could and would depart within the time authorized. There is nothing in the record to show that he has any criminal record. In the United States he has a wife, who is also in an illegal status, one child who was born in Mexico and one child who was born in the United

States. He has only one previous abuse of the voluntary departure privilege and, after he did depart on that occasion, he remained out for a substantial period of time. He is statutorily eligible for the form of relief requested and, as a matter of administrative discretion, it will be granted to him.

ORDER: It is ordered that, in lieu of an order of deportation, respondent be granted voluntary departure without expense to the Government on or before November 7, 1977, or any extension beyond such date as may be granted by the District Director, and under such conditions as the District Director shall direct.

IT IS FURTHER ORDERED that, if respondent fails to depart when and as required, the privilege of voluntary departure shall be withdrawn without further notice or proceedings and the following order shall thereupon become immediately effective: Respondent shall be deported from the United States to Mexico on the charge contained in the Order to Show Cause.

/s/ Newton T. Jones
NEWTON T. JONES
U.S. Immigration Judge

APPENDIX G

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals
Washington, D.C. 20530

[Feb. 21, 1980]

File: A22 346 925—Seattle

IN RE: ELIAS SANDOVAL-SANCHEZ

IN DEPORTATION PROCEEDINGS

APPEAL

ON BEHALF OF RESPONDENT: Charles H. Barr, Esq.
P.O. Box 2733
Tri-Cities, WA 99302

ON BEHALF OF I&N SERVICE: Kenneth D. Bryant
Acting Trial Attorney

CHARGE:

Order: Sec. 241(a)(2), I&N Act (8 U.S.C. 1251
(a)(2))—Entry without inspection

APPLICATION: Termination

The respondent appeals from an October 7, 1977, decision of the immigration judge finding him deportable under section 241(a)(2) of the Immigration and Nationality Act, 8 U.S.C. 1251(a)(2), as an entrant without inspection, but granting him the privilege of voluntary departure. The appeal will be dismissed.

The respondent is a 25-year-old native and citizen of Mexico, who entered the United States without in-

spection in June 1976. He was apprehended at his place of employment in 1977 after the plant manager had given the Service permission check for persons illegally in this country. At deportation proceedings held in July 1977, the respondent was found deportable under section 241(a)(2) of the Act based on his admissions, as reflected on a Form I-213 ("Record of Deportable Alien"), and on the testimony of the officer who prepared the Form I-213. The document was admitted into evidence over the objections of respondent's counsel.

On appeal, the respondent, through counsel, renews his objection to the admission of the Form I-213. He submits that "no proper foundation was laid" for the admission of the document, that the information reflected on the form "was obtained involuntarily from [the respondent] while he was in custody of the Service in actual physically coerced detention in jail without being priorly advised of his full right to counsel [and] without being afforded an actual opportunity to consult counsel as he requested," that the respondent was not advised of his "right to silence and the full *Miranda* warnings as required by due process and by the Service's own regulations and without the use of [the Form] I-214," and that the respondent's initial arrest was "ultra vires the Service's lawful authority. . . ." It is also submitted on appeal that the Order to Show Cause was invalidly issued and that the respondent's deportation would unlawfully result in the de facto deportation of his United States citizen child.

We find that the admission of the Form I-213 was fundamentally fair and that the document established the respondent's deportability by clear, convincing, and unequivocal evidence. See *Trias-Hernandez v.*

INS, 528 F.2d 366, 369 (9 Cir. 1975); *Martin-Mendoza v. INS*, 499 F.2d 918, 921 (9 Cir. 1974). A proper foundation was laid for the introduction of the Form I-213 by the preparing officer's testimony. Moreover, there was no requirement by law or regulation that the "Miranda" warnings or comparable admonitions be given.¹ See *Trias-Hernandez, supra*, at 368. See also *Navia-Duran v. INS*, 568 F.2d 803, 808 (1 Cir. 1977); *Avila-Gallegos v. INS*, 525 F.2d 666, 667 (2 Cir. 1975); *Chavez-Raya v. INS*, 519 F.2d 397, 399-401 (7 Cir. 1975). Further, the preparing officer testified that the respondent did not ask to speak to an attorney until after the Form I-213 was processed. See also *Trias-Hernandez v. INS, supra*; *Nason v. INS*, 370 F.2d 865, 867-868 (2 Cir. 1967) (regarding presence of counsel during questioning). In addition, there was no evidence that the respondent's admissions recorded on the Form I-213 were either involuntarily made or coerced. The respondent's own testimony in fact reflected that he voluntarily answered all questions asked by the immigration officer even though at one point during the hearing he conceded being aware that he did not have to do so. Finally, with regard to the Form I-213, we find no basis to conclude upon review of the record as a whole (particularly the respondent's own testimony) that the circumstances of the respondent's arrest affected the statements contained in the Form I-213. See also *Matter of Sandoval*, Interim Decision 2725 (BIA 1979) (holding Fourth Amendment ex-

¹ The respondent was advised in Spanish and English of a right to consult counsel and the right to a hearing to determine his deportability. See Form I-274 ("Request for Return to Mexico").

clusionary rule inapplicable in civil deportation proceedings).

As we find no basis to conclude that the Order to Show Cause was improperly issued and no merit to the respondent's contentions regarding the de facto deportation of his United States citizen child,² the appeal will be dismissed.

ORDER: The appeal is dismissed.

FURTHER ORDER: Pursuant to the immigration judge's order, the respondent is permitted to depart from the United States voluntarily within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director; and in the event of failure so to depart, the respondent shall be deported as provided in the immigration judge's order.

/s/ David L. Milhollan
Chairman

² See *Urbano del Malaluan v. INS*, 577 F.2d 589, 594 (9 Cir. 1978), and the cases cited therein.

APPENDIX H

UNITED STATES DEPARTMENT OF JUSTICE
Board of Immigration Appeals
Washington, D.C. 20530

[Apr. 25, 1980]

File: A22 346 925—Seattle

IN RE: ELIAS SANDOVAL-SANCHEZ

IN DEPORTATION PROCEEDINGS

MOTION

ON BEHALF OF PETITIONER: Charles H. Barr, Esquire
P.O. Box 2733
Tri-Cities, Washington
99302

ON BEHALF OF SERVICE: Kendall B. Warren
Trial Attorney

CHARGE:

Order: Section 241(a)(2), I&N Act (8 U.S.C.
1251(a)(2))—Entry without in-
spection

APPLICATION: Motion to reopen

In a decision dated February 21, 1980, the Board dismissed the respondent's appeal from an October 7, 1977, immigration judge's decision finding him deportable as charged and granting him the privilege of voluntary departure. On March 21, 1980, the respondent, through counsel, moved the immigration judge to reopen the deportation proceedings. The

motion was properly forwarded to the Board for adjudication. See 8 C.F.R. 3.2. The motion will be denied.

In our February 21, 1980, decision in this case, we concluded that the respondent had been adequately informed of his right to consult with counsel and that he had apparently been aware that he had a right to remain silent at his initial Service interview. The record did not indicate that the respondent was unaware of the reason for his arrest, nor was it clear that the officer who questioned him in June 1977 was the officer who had arrested him. Accordingly, we find no basis to reopen proceedings based on an unspecified claim of "[material] prejudice" arising from an alleged violation of the requirements of 8 C.F.R. 287.3.

It is further alleged for the first time in the motion to reopen that the respondent was "at no time at or subsequent to [his] arrest . . . ever advised . . . that he could communicate with the consular or diplomatic officers of [his] country of nationality" See 8 C.F.R. 242.2(e); *United States v. Calderon-Medina*, 591 F.2d 529 (9 Cir. 1979). The regulation in question does not specify that such advice should be immediately given upon an alien's arrest (i.e., that the advice be given before the Service determines that an Order to Show Cause will be issued and an alien in fact continued in a detained status). Thus, we do not find the fact that the advice was not immediately given to the respondent to affect the admissibility of the Form I-213 (a document which is prepared during the period when a determination is being made as to whether or not to further detain an alien for deportation proceedings). Moreover, counsel has alleged no identifiable prejudice stemming from the sub-

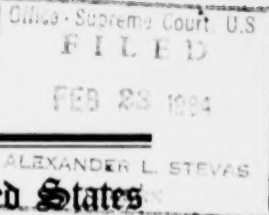
mitted failure to advise the respondent during the period of his detention¹ of his right to communicate with a consular officer. Accordingly, we decline to order proceedings reopened based on the record before us.

ORDER: The motion to reopen is denied.

/s/ David L. Milhollan
Chairman

¹ The respondent's wife was released on her own recognizance on the day of her arrest. The respondent apparently was detained for six days in 1977 and then released under a \$1500 bond.

No. 83-491



In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ADAN LOPEZ-MENDOZA AND
ELIAS SANDOVAL-SANCHEZ

ON WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

JOINT APPENDIX

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**PETITION FOR CERTIORARI FILED
SEPTEMBER 22, 1983
CERTIORARI GRANTED JANUARY 9, 1984**

In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-491

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ADAN LOPEZ-MENDOZA AND
ELIAS SANDOVAL-SANCHEZ

ON WRIT OF CERTIORARI
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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7673

D.C. No. I&NS# A22-452-208

PETITION FOR REVIEW

NORTHERN CALIF.

CONSOLIDATED: 80-7189

ADAN LOPEZ-MENDOZA, PETITIONER,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

RELEVANT DOCKET ENTRIES

| Date | Filings-Proceedings |
|-------------|---|
| <i>1979</i> | |
| Dec 17 | PAID DOCKET FEE. -vt- |
| Dec 17 | FILED ORIG. & SIX COPIES OF A PETITION FOR REVIEW OF AN ORDER OF THE I&NS. -vt- |
| Dec 17 | DOCKETED CAUSE & ENTERED APPEARANCE OF COUNSEL. -vt- |
| Dec 17 | Notified counsel for the respondent issued copies. -vt- |
| <i>1980</i> | |
| Jan 16 | FILED, AS OF 1/7/80, CERT ADMIN RECORD ON APPEAL IN ONE VOLUME. PLDGS, VOL. I, ORIG AND TWO COPIES. -tdp- |
| Jan 16 | Petitioner's opening brief due 2/25/80. -tdp- |
| * * * | |
| May 23 | Filed orig & 15 petitioner's opening briefs. (5/22/80) -ogm- |
| May 23 | R'cvd 5 Excerpts (not necessary; records already here). -ogm- |
| * * * | |
| Oct 6 | Filed orig & 15 Resp ans brief (9/22). -pf- |
| Oct 17 | Filed orig & 15 Aptl's reply brief (10/15), per ogm as aple brief rec'd by aptl 10/2. -pf- |
| * * * | |
| <i>1981</i> | |
| Jan 12 | ARGUED & SUBMITTED before: TANG, FLETCHER, CJJ & WILLIAM G. EAST, DJ, OREGON. -pf- |

Jan 30 Rec'd letter dated 4/27/81 from petitioner counsel re addl. citation. (panel) -dmf-

Feb 21 Filed in 80-7189, order (Browning, Wright, Choy, Goodwin, Wallace, Sneed, Kennedy, Anderson, Hug, Tang, Skopil, Schroeder, Fletcher, Farris, Pregerson, Alarcon, Poole, Ferguson, Nelson, Canby, Boochever, Norris, Reinhardt) it is ordered that cases 80-7189 and 79-7673 shall be reheard by an en banc panel of the court. The previous three-judge panel assignments are hereby withdrawn. -dmf-

Mar 3 Filed order (Browning, Wright, Goodwin, Wallace, Hug, Tang, Fletcher, Poole, Canby, Norris, Reinhardt) cases 79-7673 and 80-7189 are hereby consolidated for purposes of rehearing before the above-listed en banc panel. -dmf-
as of 9/30/81 Filed order (BROWNING, WRIGHT, GOODWIN, WALLACE, HUG, TANG, FLETCHER, POOLE, CANBY, NORRIS & REINHARDT) Oral argmrnt [sic] will be heard on Friday, December 18, 1981 at 1:30 p.m., in San Francisco, CA. -vt-

Dec 10 Filed resp add'l citations. (panel & active judges) -vt-

Dec 11 Filed petr's add'l citations. (panel & all active) -vt-

Dec 14 Rec'd, in 80-7189, letter dated 12/11/81 from resp. re: copies of cases previously cited to court (filed 12/10) for distribution to panel, to en banc panel. 12/11/81 -ck-

Dec 18 ARGUED AND SUBMITTED BEFORE: BROWNING, WRIGHT, GOODWIN, WALLACE, HUG, FLETCHER, ALARCON, POOLE, CANBY, NORRIS, AND REINHARDT, CJJ. -lb-

1983

Apr 25 ORDERED OPINION FILED (NORRIS), GOODWIN CONCURRING, ALARCON, WRIGHT, WALLACE & POOLE DISSENTING & JUDG TO BE FILED AND ENTERED

Apr 25 FILED OPINION—REVERSED & REMANDED.

Apr 25 FILED & ENTERED JUDGMENT. -lm-

May 6 Filed motion and order for an extension of time for filing a petition for rehearing. Respondent shall file petition for rehearing by June 9, 1983. -jt-

May 6 Filed in 80-7189 petr (SANCHEZ) bill of costs (5/3) -ag-

May 12 Filed petr's (Lopez-Mendoza) bill of costs (5/9) -jt-

May 12 Rec'd letter from petr's (Lopez-Mendoza) counsel, re: incorrect caption on Court's decision. (panel) -jt-

* * *

June 15 MANDATE ISSUED w/costs.

* * *

Oct 5 Rec'd notice of filing of petition for certiorari from Supreme Court. bbn. 9-22-83 (panel & Lib.)

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 80-7189

D.C. No. I&NS# A22-346-925

PETITION FOR REVIEW
FROM I&NS

WASHINGTON (Seattle)
CONSOLIDATED: 79-7673

ELIAS SANDOVAL SANCHEZ, PETITIONER,

vs.

IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT

RELEVANT DOCKET ENTRIES

| | |
|--------|---|
| Date | Filings-Proceedings |
| 1980 | |
| Apr 14 | PAID DOCKET FEE. -vt- |
| Apr 14 | FILED ORIG & SIX COPIES OF A PETITION FOR REVIEW OF AN ORDER OF THE I&NS. -vt- |
| Apr 15 | DOCKETED CAUSE & ENTERED APPEARANCE OF COUNSEL. -vt- |
| Apr 15 | Notified counsel for the respondent issued copies. -vt- |
| May 15 | FILED CERT ADMIN RECORD ON APPEAL IN ONE VOLUME. VOL. I, PLDGS, THREE CERT COPIES. -tdp- |
| May 15 | Petitioner's opening brief due 6/24. -tdp- |
| May 16 | Filed, as of May 15, petitioner's amended petition for review. 5/9 -dmf- |
| May 16 | Issued copies of amended petition to respondents. -dmf- |
| Jun 26 | Filed orig & 15 petitioner's opening briefs. (6/24/80) -ogm- |
| Jul 25 | Filed orig & 15 respondent's briefs. (7/24) -ogm- |
| Dec 30 | Rec'd, as of Dec 29, petitioner's addl. citations. (panel) -dmf- |
| Dec 30 | Filed, as of Dec 29, petitioner's motion for submission without oral argument. (panel) 12/23 -dmf- |

* * *

1981

Jan 8 SUBMITTED ON THE BRIEFS TO WRIGHT,
FARRIS, NORRIS, CJJ -pv-

- Jul 21 Filed order (Browning, Wright, Choy, Goodwin, Wallace, Sneed, Kennedy, Anderson, Hug, Tang, Skopil, Schroeder, Fletcher, Farris, Pregerson, Alarcon, Poole, Ferguson, Nelson, Canby, Boochever, Norris, Reinhardt) it is ordered that cases 80-7189 and 79-7673 shall be reheard by an en banc panel of the court. The previous three-judge panel assignments are hereby withdrawn. -dmf-
- Jul 23 Filed in 79-7673, order (Browning, Wright, Goodwin, Wallace, Hug, Tang, Fletcher, Poole, Canby, Norris, Reinhardt) cases 79-7673 and 80-7189 are hereby consolidated for purposes of rehearing before the above-listed en banc panel. -dmf-
- Oct 1 as of 9/30/81 Filed order (BROWNING, WRIGHT, GOODWIN, WALLACE, HUG, TNAG[sic], FLETCHER, POOLE, CANBY, NORRIS AND REINHARDT) Oral argument will be heard on Friday, December 18, 1981 at 1:30 p.m. in S.F. CA., -vt-
- Oct 15 Filed as of Oct 15, 1981 Order (BROWNING, WRIGHT, GOODWIN, HUG, WALLACE, FLETCHER, ALARCON, POOLE, CANBY, NORRIS, & REINHART [sic]) Judge Tang being unable to participate [sic] at the time designated for the en banc hearing, Judge Alarcon has been selected by lot to replace Judge Tang on the en banc court pursuant to rule 25 of the Rules of the United States Court of Appeals for the Ninth Circuit. -ho-
- Dec 10 Filed resp add'l citations. (panel & active judges)
- Dec 14 Rec'd letter dated 12/11/81 from resp., re: copies of cases previously cited to court (filed 12/10) for distribution to panel, to en banc panel. 12/11/81 -ck-
- Dec 18 ARGUED AND SUBMITTED BEFORE: BROWNING, WRIGHT, GOODWIN, WALLACE, HUG, FLETCHER, ALARCON, POOLE, CANBY, NORRIS AND REINHARDT, CJJ. -lb-
- [1983]
- Apr 25 ORDERED OPINION FILED (NORRIS), GOODWIN CONCURRING, ALARCON, WRIGHT, WALLACE & POOLE DISSENTING & JUDG TO BE FILED AND ENTERED.
- Apr 25 FILED OPINION—REVERSED & REMANDED.
- Apr 25 FILED & ENTERED JUDGMENT. -lm-
- May 6 Filed motion and order for an extension of time for filing a petition for rehearing. Respondent shall file petition for rehearing by June 9, 1983. -jt- Motion filed in 80-7189.
- May 6 Filed petr (SANCHEZ) bill of costs (5/3) -ag-

- May 12 Filed in 79-7673 petr's (Lopez-Mendoza) bill of costs 5/9
-jt-
- May 12 Rec'd in 79-7673, letter from petr's (Lopez-Mendoza)
counsel, re: incorrect caption on Court's decision. (pan-
el) -jt-

* * *

June 15 MANDATE ISSUED w/costs.

* * *

- Jul 22 Rec'd Supreme Court order granting (Solicitor General)
an ext. of time within which to file a petition for a writ
of certiorari to & incl. September 22, 1983. (Civatt) -lm-
- OCT 4 Rec'd copies of resp petition for certiorair [sic].

IN THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

No. 79-7673

ADAN LOPEZ-MENDOZA, PETITIONER,
v.
IMMIGRATION AND NATURALIZATION SERVICE,
RESPONDENT.

Petition for Review of a Order of the
Immigration and Naturalization Service

CERTIFIED ADMINISTRATIVE RECORD
A22 452 208

UNITED STATES OF AMERICA
DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

January 4, 1980

CERTIFICATION

BY VIRTUE OF the authority vested in me by Title 8, Code of Federal Regulations, Part 103 a regulation issued by the Attorney General pursuant to Section 103 of the Immigration and Nationality Act,

I HEREBY CERTIFY that the annexed documents are originals, or copies thereof, from the records of the said Immigration and Naturalization Service, Department of Justice, relating to File No. A22 452 208, Adan Lopez-Mendoza, of which the Attorney General is the legal custodian by virtue of Section 103 of the Immigration and Nationality Act.

In compliance with 28 USC 2346 and 28 USC 2112, I further certify that the attached is the full, true, and correct administrative record, as required by 8 CFR 242.15, upon which the final deportation order is based.

DAVID N. ILCHERT
District Director
Immigration and Naturalization Service

Form G-24
(Rev. 5-1-73)N

RECORD OF PROCEEDINGS, DEPORTATION
ADAN LOPEZ-MENDOZA

Immigration and Naturalization Service
File A22 452 208

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| Decision of the Board of Immigration Appeals dated September 19, 1979 ordering the appeal dismissed | 1-3 |
| Government Reply Brief in Support of the Immigration Judge's Decision dated March 7, 1978 | 4-8 |
| G-29 dated February 10, 1978 from Philip P. Leadbetter, Trial Attorney to Immigration Judge Kroll requesting an extension of time to file brief | 9 |
| Form I-329 dated January 31, 1978 advising a brief in opposition to the appeal may be filed | 10 |
| Appellants' Opening Brief dated January 24, 1978 . | 11-23 |
| Form I-290A, Notice of Appeal to the Board of Immigration Appeals dated January 3, 1978 | 24 |
| Form I-295 dated December 21, 1977 advising an appeal may be filed | 25 |
| Letter dated December 19, 1977 requesting a copy of transcript | 26 |
| Decision of the Immigration Judge dated December 21, 1979 ordering voluntary departure | 27-29 |
| Transcript of Hearing in Deportation Proceedings held on October 8, 1976 (pp. 1-102) | 30-132 |
| Exhibits to Transcript of Hearing in Deportation Proceedings held on October 8, 1972: | |
| Exhibit 1 Order to Show Cause, Notice of hearing and Warrant for Arrest of Alien | 133-134 |
| Exhibit 2 Form I-213, Record of Deportable Alien | 135 |

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| Exhibit 3 | Record of Sworn Statement in Affidavit Form | 136-137 |
| Exhibit A | Photograph | 138 |
| Exhibit B | Photograph | 139 |
| Exhibit C | Form G-123 | 141-141 [sic] |

630 Sansome Street

San Francisco, CA 9 1

In the Matter of

Adan LOPEZ-Mendoza

File

1. I hereby appeal to the Board of Immigration Appeals in the above entitled case.

2. Briefly, state reasons for this appeal.

(1) Respondent's deportation, seizure of evidence, is

(2) This case is distinguishable
Int. Dec. #2527 relied upon

3. I do (do) (do not) desire oral argument.

Washington, D. C.

4. I am (am) (am not) filing a separate written brief or statement.

I hereby request a period of three weeks from today's date within which to file Respondent's brief herein.

January 3, 1978

Date

Individual Fee Register Receipt

UNIT STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

FEE PAID NUMBER

SFR 578 066971

APPLICANT

Adan Lopez-Mendoza

DATE

REMITTER - IF OTHER THAN APPLICANT

APPLICATION FORM NUMBER

(CIRCLE)

| | | | | | |
|-------|---------|--------|----------------|-------|-------|
| G-639 | I-129 B | I-192 | <u>I-240 A</u> | I-600 | N-577 |
| G-641 | I-129 F | I-193 | I-290 B | I-601 | N-580 |
| G-657 | I-130 | I-196 | I-485 | I-612 | N-600 |
| I-17 | I-131 | I-212 | I-506 | N-455 | |
| I-90 | I-140 | I-246 | I-559 | N-455 | |
| I-102 | I-191 | I-256A | I-570 | N-595 | |

BANK
TRANSIT
NO

OTHER

TYPE OF
REMITTANCE
(CIRCLE)PC

BC

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(CIRCLE)INS

TC

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OTHER (ABBV)

REC'D BY (INITIALS)

AMOUNT

\$ 50.00

SAMPLE - TOP RIGHT EDGE OF APPLICATION

GPO: 1977 246 710

Signature of Appellant (or attorney or representative)

DOUGLAS P. HAFFER

XXX (Print or type name)

693 Sutter Street, San Francisco 94102

Address (Number, Street, City, State, Zip Code)

IMPORTANT: SEE INSTRUCTIONS ON REVERSE SIDE OF THIS NOTICE

Form I-290A
(Rev. 4-1-76)N

1-4-78 cc to TTV P.P. L... SFR

024

**MATTER OF
ADAN LOPEZ-MENDOZA
Respondent**

FILE A-22 452 208 - San Francisco

**IN DEPORTATION PROCEEDINGS
TRANSCRIPT OF HEARING**

Before: Monroe Kroll, Immigration Judge

Date: October 8, 1976

Place: 630 Sansome Street, San Francisco, California

Transcribed by Mary L. Moynihan

Recorded by Mary L. Moynihan

Official Interpreter Virginia Miranda

Language Spanish

APPEARANCES:

**For the Service:
Philip P. Leadbetter, Esq.
Trial Attorney
San Francisco, California**

**For the Respondent:
Douglas P. Haffer, Esq.
534 Pacific Avenue
San Francisco, California 94133**

THE IMMIGRATION JUDGE: This is a deportation proceeding against Adan Lopez-Mendoza, who will testify in the Spanish language through the official interpreter, Miss Virginia Miranda.

Is Adan Lopez-Mendoza present?

MR. HAFFER: Yes, he is, Your Honor. He's present.

THE IMMIGRATION JUDGE: Have him step forward, Mr. Haffer.

The record may show that Mr. Haffer, after indicating that Adan Lopez-Mendoza was present, asked a male individual to step forward and take the witness stand and that person is now seated on the witness stand.

Q Are you Adan Lopez-Mendoza?

A Yes.

THE IMMIGRATION JUDGE: Are you ready for the respondent, Mr. Haffer?

MR. HAFFER: Yes, Your Honor. We are ready to proceed.

THE IMMIGRATION JUDGE: Are you ready for the Service, Mr. Leadbetter?

MR. LEADBETTER: I am, Your Honor.

THE IMMIGRATION JUDGE:

Q Mr. Lopez-Mendoza, to be sworn, stand up, please, and raise your right hand. You do solemnly swear that everything you say at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God.

A Yes.

THE IMMIGRATION JUDGE: You may be seated.

The —

MR. HAFFER: Your Honor, if I may at this time make a request prior to the entry of the Order to Show Cause in the record and prior to the respondent answering the charges in the Order to Show Cause. We would like to make a motion to terminate the proceedings at this time on the basis of lack of jurisdiction of this Court because of the illegal arrest of Mr. Lopez. I think it would be appropriate to take evidence on the issue of the arrest prior to taking any evidence on the merits of the matter since if the merits of the matter have been heard and are on the record the issue of the illegal arrest is moot, perhaps.

THE IMMIGRATION JUDGE: What do you claim was illegal about his arrest?

MR. HAFFER: We claim that the investigators of the Immigration Service entered onto private property without a warrant. They arrested Mr. Lopez without a warrant. And under the provisions of Section 287 of the Immigration and Nationality Act a warrant in most cases is required. In this case, specifically, a warrant was required. If I may, specifically, Your Honor, Section 287(a)(2) of the Act provides in part that the immigration officer shall have the power without warrant to arrest any alien in the United States if he has reason to believe the alien so arrested is in the United States in violation of any such law or regulation

—
THE IMMIGRATION JUDGE: I am familiar with that regulation.

MR. HAFFER: — and is likely to escape before a warrant can be obtained.

THE IMMIGRATION JUDGE: Having made that claim, you have the burden of establishing it.

MR. HAFFER: Yes, Your Honor, we do. We are ready to proceed, if we may, in establishing the fact that a warrant could and should have been obtained in this case and that the entry onto private property by the immigration officers was in violation of law and the arrest of the respondent was in violation of the law.

THE IMMIGRATION JUDGE: Proceed.

MR. HAFFER: We would first like to call the investigators. Are they ready to be called?

MR. LEADBETTER: They are.

MR. HAFFER: May we call Investigator Eddy.

THE IMMIGRATION JUDGE: What is his full name?

MR. HAFFER: I don't know what his first name is.

MR. LEADBETTER: I believe his first name is Robert J. Eddy.

THE IMMIGRATION JUDGE: Call him.

Step down, Mr. Lopez-Mendoza.

The record may show that the trial attorney left the courtroom and reentered with a male person.

Q What is your name?

A Robert C. Eddy.

Q To be sworn, Mr. Eddy, stand up, please, and raise your right hand. You do solemnly swear that everything you say at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God.

A I do.

THE IMMIGRATION JUDGE: You may be seated.

You may proceed, Mr. Haffer.

BY MR. HAFFER:

Q Mr. Eddy, did you participate in an arrest at Transco in San Mateo on August 3, 1976?

A Yes, I did.

Q And the address there was 511 East First Avenue in San Mateo?

A I believe it was.

Q Who accompanied you at that time?

A Criminal Investigator Robert Elder.

Q Do you remember what time of day you arrived at Transco?

A It was between 7:00 a.m. and 8:00 a.m. I can't be sure of the exact time.

Q Did you then arrest the respondent, Mr. Lopez-Mendoza?

A Yes, we did.

Q Do you recognize the man sitting next to me as the respondent that you arrested?

A I believe I do.

Q When you and Mr. Elder went to the premises of Transco, what information did you possess that there were immigration violations there?

A We possessed information indicating that there were seven illegal aliens employed by Transco in San Mateo.

Q Did you have the names of these seven —

A Yes, we did.

Q Did you determine prior to that time, or after or since that time the validity of this information?

A Well, there was at least one illegal alien employed there.

Q But, to your knowledge, were there any more than one?

A We haven't ascertained that.

Q Who supplied this information to you?

A An informant by the name of Gloria Gutierrez.

Q Did you receive information from Miss Gutierrez prior to this time?

A Not personally.

Q Had the Immigration Service received other information from Miss Gutierrez?

A I have no knowledge of that. Perhaps. I don't know.

Q Did you have any way of knowing at the time you received the information whether it was a reliable tip or not?

A I telephoned the informant prior to August 3rd, 1976, to discuss the information with her. She sounded reliable over the telephone. She sounded like she knew what she was talking about. She knew these individuals.

Q When did you first receive information from her that there were seven illegal aliens at Transco?

A I believe it was July 6, 1976.

Q Approximately when did you call her back to confirm or to discuss this matter with her further?

A August 2nd, 1976.

Q At what time of the day, if you recall?

A Sometime in the afternoon, probably three or four p.m.

Q Did you receive the original call from her on July 6th, 1976?

A No, I didn't.

Q Do you know who did?

A No, I don't.

Q How did you find out about this original contact by Miss Gutierrez?

A The information was written on a Form G-123 by a Service officer or a Service representative. I don't recall whom, and the informant gave her name and telephone number.

Q Do you know where this Form G-123 is now?

A It should be in the Service file.

Q When you arrived at Transco on the morning of August 3, 1976, did you enter the premises?

A Yes, we did.

Q How did you enter? Did you enter through a door?

A Through an opened door.

Q Were you aware at the time that Transco was a private company?

A Yes, I was aware of that.

Q Did you feel that it was — you didn't feel, then, that it was a public place?

A Well, the door, I should point out, was wide open, it wasn't just unlocked. It looked like a retail outlet of some kind. It looked like a type of establishment where somebody interested in purchasing something would enter through the same door we entered through.

Q Did it look like a retail establishment when you were outside or inside?

A Well, from the outside it looked like a transmission rebuilding shop or some kind of mechanical shop.

Q Now, the door you entered through, was it a regular door, was it a garage door, or what was it? Exactly what kind of door was it?

A It was a regular door.

Q It was wide open?

A Wide open.

Q Did you and Mr. Elder enter at the same time?

A Yes, we did.

Q After you entered, did you talk to somebody in the shop?

A Yes, we did.

Q Who did you talk to?

A Mr. Art Bradley.

Q How long after you entered the company did you talk to Mr. Bradley?

A We entered the door, through the door and stood by the door for two minutes, looked around for an interior office of some kind. We wanted to let somebody know we were in there. Mr. Bradley nodded to us when we walked in but he made no move to approach us at all. We stood there for approximately two minutes. Then I approached Mr. Bradley.

Q Prior to the time that you approached Mr. Bradley, as far as you know, he would have no way of knowing you

were from the Immigration and Naturalization Service. Is that correct?

A As far as I know.

Q You didn't yell out —

A No.

Q — "Immigration Service." or anything of that nature?

A No.

Q Two minutes after you entered you had approached Mr. Bradley?

A Yes, I did.

Q Where was Mr. Bradley at this time?

A He was engaged in his work in the shop.

Q How did you know that you were to approach Mr. Bradley?

A Mr. Bradley was the only one who nodded to us as we walked in.

Q How far away from you was he when he nodded to you?

A Approximately ten yards.

Q Did he signal anything to you, wave to come forward to him, or anything?

A No, he didn't.

Q So when you approached Mr. Bradley, what did you say to him?

A I identified myself. I presented my Service credentials. I advised him we had several names. I presented him with a piece of paper on which the names were written, the names provided by Gloria Gutierrez, and I advised him that we would like to interview these individuals.

Q Where was Mr. Elder at this time?

A He was standing by the door.

Q By the outside door?

A Inside the establishment, but by the door.

Q I assume to prevent people from running out through that door?

A That's correct.

Q After you identified yourself and stated to Mr. Bradley that you had several people that had been identi-

fied to you as illegal aliens, what did Mr. Bradley say to you?

A Mr. Bradley said something to the effect that he would not permit us to interview these individuals at that time.

Q Were you in possession of an arrest warrant?

A No, I was not.

Q Did Mr. Bradley ask you for some form of warrant or order?

A As I recall, he said that we would not interview his employees without a court order.

THE IMMIGRATION JUDGE:

Q Did he say you would not or you could not?

A I don't really recall.

Q You just testified that he had said you would not.

A He was emphatic. He said, "No, you will not interview my employees without a court order."

BY MR. HAFFER:

Q What happened after that?

A I advised Mr. Bradley that we would proceed with the interviews.

Q Did you indicate to Mr. Bradley that you had the authority to do so?

A No. I terminated the conversation at that point and walked away from him.

Q But you did continue with the interviews, is that correct, of the employees?

A Yes.

Q Mr. Elder through all of this time was standing by the door?

A As I walked away from Mr. Bradley, Mr. Elder proceeded further into the establishment and engaged himself in conversation with Mr. Bradley.

Q So Mr. Elder began to talk to Mr. Bradley?

A That's correct.

Q Was there any physical altercation between you and Mr. Bradley at this time?

A No.

Q Do you know if there was any physical altercation between Mr. Bradley and Mr. Elder?

A No, there wasn't.

Q Did you ever mention to or threaten Mr. Bradley with the possibility of arrest for interfering with your work?

A Yes, I did.

Q How, exactly, did you do that? What were your words, if you remember?

A Well, okay, I had already interviewed Mr. Lopez.

Q This was later, then?

A This was later.

Q Let's go in chronological order. After you left Mr. Bradley for the first time, then, and Mr. Elder came over and began conversing with Mr. Bradley, what did you do?

A I approached Mr. Lopez.

Q At that moment, what did you say to Mr. Lopez?

A I identified myself to him as an immigration officer and presented my credentials.

Q Did you identify yourself in the Spanish language?

A Yes, I did.

Q And you showed him your identification?

A No. Excuse me. Let me change that. I'm sure I probably first identified myself to him in the English language and when I received a look of — well, when he obviously did not understand what I said, I identified myself in the Spanish language.

Q After you identified yourself, what did you do? What did he say to you?

A Immediately after I identified myself, he didn't say anything.

Q Did you then take him into custody?

A No. I questioned him. I asked him his name, I asked him where he was from, how he entered the United States. I questioned him as to family ties, equities in the United States, made a determination that he did not have any immediate family here in the United States.

Q Was Mr. Lopez-Mendoza one of the people on the list of names given you by Gloria Gutierrez?

A No, he wasn't.

Q What made you think that he was in the United States illegally?

A There were seven names on the list. Mr. Haffer, provided by Gloria Gutierrez and there were no more than seven individuals in Transco that we could see.

Q So, your basis for thinking he was here illegally was the list that Gloria Gutierrez had given you?

A That's correct.

Q After this conversation when you determined that Mr. Lopez-Mendoza was here without family ties and papers, did you then take him into custody?

A I advised him he was under arrest.

Q At this time, then, did Mr. Bradley [become] involved once again in conversation with you?

A In a way, yes. I began escorting Mr. Lopez out of the building. We had to pass by Mr. Elder and Mr. Bradley, who were still engaged in conversation. I advised Mr. Bradley that his employee was under arrest. He said that we could not do that, that he would not let us arrest his employee.

Q At which point, did you then mention to him the possibility of arrest for interfering with you?

A Well, no, not at that time. Mr. Bradley put himself between Investigator Elder and I and the alien so the alien was backed up against some machinery in the plant, and Mr. Bradley was in front of him, would not move himself. I advised Mr. Bradley that if he did not move that we would consider that interference with the arrest, that I would arrest him also.

Q Were you aware of Mr. Bradley's immigration status?

A No, I was not.

Q You said before there were only seven people in the whole shop. Did you assume he was also an illegal alien?

A No, I didn't since he advised me that he was the owner of the shop. And he spoke English very well.

Q Did you question any other people in the shop besides Mr. Lopez?

A No, we didn't.

Q Why not, if you thought they were illegal aliens?

A We wanted to avoid an incident, Mr. Haffer.

Q Did you know whether or not Mr. Bradley sought the assistance of local law enforcement personnel?

A Yes, he did.

Q In what way, what form, do you know?

A He advised one of his employees to call the police. We agreed. We thought the police should be called in for assistance.

Q Both you and Mr. Elder agreed?

A We did not call the police, but we agreed with Mr. Bradley that perhaps a little assistance from the local law enforcement officials would be helpful for us.

Q Neither one of you shouted, "No, don't call the police"?

A No.

Q Now, you mentioned that Mr. Lopez-Mendoza was not on the list of the seven given to you by Miss Gutierrez. That's correct, is it?

A I'd like to correct one thing you said before. I didn't say that I counted the employees within the establishment and there were exactly seven employees in there. What I said was, there were no more than seven, perhaps, five or six. I don't know exactly how many were in there at the time, but no more than seven.

Q But you did testify previously that one reason why you questioned Mr. Lopez about his immigration status was because you had had a list of seven names of people who were supposedly working at Transco illegally, and because there were fewer than seven in the shop you assumed that he might, therefore, be an illegal alien.

A Exactly.

Q So, my question, obviously, related to Mr. Bradley, whether or not you had the same assumption, since there were seven or fewer in the shop, relating to him, and you answered, no, because you thought that he was the owner of the shop. I believe that was the answer you gave.

A Right.

Q You did testify before that Mr. Lopez-Mendoza's name was not on that list.

A That is correct.

Q When you approached Mr. Bradley for the first time, you did not mention Mr. Lopez's name?

A I didn't mention anyone's name. I simply showed him the list of individuals that had been provided to us by Gloria Gutierrez and advised him that I would like to question these individuals. We didn't get into names. He glanced at the list and confirmed whether or not any of those individuals were employed by his establishment.

Q Do you know whether Mr. Elder had mentioned Mr. Lopez's name before going in and talking to —

A Of course, I don't know that for a fact. Mr. Elder and I were not in contact at that moment. But I assume that he couldn't have mentioned Mr. Lopez's name since we did not know Mr. Lopez's name at that time.

Q Where was Mr. Lopez working in the establishment in relation to where you were at the time you were talking to Mr. Bradley?

A He was nearer the door. I passed Mr. Lopez when I approached Mr. Bradley.

Q Was he the closest person to you?

A Yes. Well, no, he wasn't.

Q But you went to him first?

A Right.

Q Did you have any reason for going to him first? How about the other people who were in the shop?

A I wanted to avoid Mr. Bradley. There were two individuals standing immediately adjacent or immediately next to Mr. Bradley. I didn't want to interview anybody in his presence where he could interfere with the interview. So I chose someone who was relatively isolated.

Q Do you recall a conversation you had with me on August 3, 1976?

A Yes, I do.

Q This was subsequent to the arrest of the respondent. Is that correct?

A Yes, I do.

Q This was on the eleventh floor of this building. Immigration Service, San Francisco?

A I believe so.

Q Do you recall making a statement at that time that Mr. Lopez's name had been given to you by an informer?

A No, I do not recall saying that.

Q All right. Generally speaking, Mr. Eddy, what are the powers of the Immigration and Naturalization Service investigator to arrest or make an entry onto private property without a warrant?

A The Service policy —

Q What are the powers, as far as you understand them, to make an arrest or to make an entry onto private property without a warrant?

A Well, as I understand it, if it's a public area we have the right to enter.

Q Without warrant?

A Without warrant.

Q What level of suspicion or belief do you have to have that there are undocumented or illegal aliens in that particular place? Or do you have to have any at all?

A To enter an establishment, in a public area of an establishment? I would say no cause whatsoever.

Q What do you consider to be a public area? I think we can eliminate such places as parks and places that are clearly owned by the public and operated for the public. But speaking of a private concern, what do you consider to be a public area?

A For example, if I entered a restaurant I would consider the kitchen area a private area, while the dining area is a public area.

Q If you entered a factory?

A It's hard to say. It's kind of difficult to say at this time. Any area that's public within a factory. Every factory is different.

Q Investigator Eddy, I have two photographs here and I am wondering if this, to your best recollection, is what the interior of Transco —

A Yes, Mr. Haffer. That looks like the interior of Transco.

Q Can you say that with certainty or does it appear to be similar to it?

A It appears to be similar to it.

Q But, in general —

A That's the general layout.

MR. HAFFER: I'd like to have those introduced in evidence, if I may. Your Honor.

THE IMMIGRATION JUDGE: In all fairness, Mr. Haffer, I think if you are introducing what appears to be the interior of a shop which Mr. Eddy thinks resembles Transco, you ought to offer a photograph of the entrance where the transactions described, thus far, took place.

MR. HAFFER: This is a photograph of the entrance there, Your Honor. Yes. There is the garage door and there is a door next to do [sic].

THE IMMIGRATION JUDGE: That's not a photograph of the entrance. The entrance is in the background.

MR. HAFFER: Do you mean from the outside?

THE IMMIGRATION JUDGE: You have questioned Mr. Eddy at some length about where he was in the shop, and I don't think from what you've said — what you have handed me doesn't portray where Mr. Eddy was in the shop.

MR. HAFFER: The purpose of submitting these photographs is not to establish where Mr. Eddy was or was not in the shop, but, rather, we are now questioning Mr. Eddy as to his definition of what is a public place where he can enter without probable cause.

THE IMMIGRATION JUDGE: From what I have heard so far, Mr. Eddy walked into a place with an opened door, apparently through which general customers entered. And you haven't given me photographs of anything resembling such a place. I'll ask Mr. Eddy.

Q Is this where you were in the shop, Mr. Eddy? Do either of these photographs show where you were?

A I can see where we entered the shop, yes, from this photograph here. Of course, the perspective is distorted. Different camera lenses are going to distort —

THE IMMIGRATION JUDGE: Don't you have a photograph of the entrance?

MR. HAFFER: No, I don't. I can ask one other question before you mark them for identification.

BY MR. HAFFER:

Q In this photograph, was this the area where the original discussion with Mr. Bradley took place, as far as you can recall?

A It could have been. I really don't recall.

MR. LEADBETTER: Your Honor, the Government is going to object to the entry because no foundation has been laid as to who took them or was, in fact, the premises, the date these photographs were taken, the same as the date of the arrest.

MR. HAFFER: We would like to have them for identification purposes. Mr. Bradley is testifying. He will be glad to provide all the necessary support that Mr. Leadbetter is seeking.

MR. LEADBETTER: If he took the pictures, Mr. Haffer? I think the person who took the pictures should be made to identify he went to the premises and these are the pictures he took.

MR. HAFFER: I assume —

MR. LEADBETTER: Put it this way. Under the circumstances, if Mr. Eddy was sure that, in fact, this was the area and/or — what, at least, I think you can do is identify as to when these were taken.

MR. HAFFER: We would be glad to do that with the owner of the store.

MR. LEADBETTER: I will reserve objection, then, Your Honor, at that time.

MR. HAFFER: You may object whenever you want to Mr. Leadbetter.

THE IMMIGRATION JUDGE: What are you asking now, Mr. Haffer? That these be entered in evidence or marked for identification?

MR. HAFFER: I think marked for identification now to help assuage any doubts Mr. Leadbetter may have as to their validity and when the owner of the company is testifying, we can go into some more detail as to when, how and by whom they were taken.

THE IMMIGRATION JUDGE: Are you challenging the investigator's right to have entered the establishment, to have come inside the opening, the large opening in the rear of one of the photographs?

MR. HAFFER: If I may, Your Honor, the large opening, I think Mr. Eddy testified to, was not opened. It was a small door, a regular door that was opened. That happens to be the garage door that's open there.

THE IMMIGRATION JUDGE: You don't have a photograph of the small area?

MR. HAFFER: No, unfortunately. He testified, however, that it was a regular door. We are trying to establish that, in fact, the fact the door was open to an establishment does not thereby make the inside of that establishment a public area. In fact, there was an office, which we'll be getting to when Mr. Bradley testifies. There's an office inside the garage area, inside the shop, and that this was not a public area in which an immigration officer can enter without any cause whatsoever, to believe that people are there, without it being a violation of law.

THE IMMIGRATION JUDGE: Is it claimed the investigators did not enter the office area?

MR. HAFFER: Yes. It is claimed they did not enter the office area. It is also claimed — Mr. Bradley will be claiming that he asked the officers to wait near the front door and that they entered, they came inside anyway.

WITNESS: That he told us to wait?

MR. HAFFER: That he signaled you to wait. Like that.

THE IMMIGRATION JUDGE: The photograph showing the large opening in the rear is marked *Respondent's Exhibit "A" for Identification*. The other one is marked *Respondent's Exhibit "B" for Identification*.

Proceed, Mr. Haffer.

BY MR. HAFFER:

Q Mr. Eddy, you have testified that you consider it to be lawful to enter a public area without a warrant, with no cause whatsoever, if you believe there are illegal aliens there, as part of your job of arresting, or questioning, at least, people about their immigration status in the United States.

A We're talking about entering an establishment? It's not a question of —

Q Of entering an establishment. What do you consider to be the authority to arrest a suspected illegal immigrant.

or one suspected of violation of the immigration laws, without a warrant?

A Well, we determined that Mr. Loepz was an illegal alien, so it was no longer a question of suspect. We determined that Mr. Lopez was married, had a wife and child in Mexico at the time, he was unclear as to his address. It seemed to us he was likely to abscond. We felt that we were clearly within our authority to take him into custody.

Q Prior to seeing Mr. Lopez at that spot at Transco, you had no knowledge of his existence in the United States?

A That is correct.

Q You conducted your entire interview to find out about his status here, where his wife and child were, what his address was, inside Transco?

A That's correct.

Q And you, therefore, had reason to believe, you stated, he would abscond, escape, prior to obtaining a warrant?

A As far as we could determine, he had no close family ties.

Q Did you have a warrant for any of the seven people listed by Miss Gutierrez?

A No, Mr. Haffer, we didn't.

Q You received this information, you stated, on July 6th, 1976. Is that correct?

A Approximately.

Q Which was approximately a month prior to your visit to Transco.

A That is true.

Q Did you attempt to get a warrant for any of these people?

A No, we didn't. Clearly, there was not enough information given, there was not enough evidence to obtain a warrant.

Q There was not. What kind of evidence is needed to obtain a warrant for arrest?

A Facts.

Q What kind of facts, would you normally —

A Let me make it clear, Mr. Haffer. We did not go down there to arrest seven illegal aliens. We went to interview seven individuals and determine whether they were il-

legally in the United States. We had probable cause, we had names, information these individuals were illegally in the United States. We simply went down there to check out the information and ascertain its correctness.

Q What was the last word?

A Ascertain whether it was correct.

Q You didn't have probable cause for a warrant. Is that what you're saying, for any of these seven?

A We didn't have enough information. We didn't have ages, we didn't — all we had was names, and Gloria Gutierrez saying these individuals were illegally in the United States.

Q Now, on previous occasions you have applied to the District Director for warrants of arrest. Have you not?

A I have applied, yes.

Q How many times, approximately?

A Numerous times. I could not say.

Q Have you ever received a warrant of arrest, to issue one on someone?

A Yes, I have.

Q What sort of information was required for those?

A Information obtained through a direct interview with a Service officer indicating that the person is illegally in the United States, or documentary evidence, evidence indicating that a person entered the United States at a certain place, at a certain time, a passport, perhaps.

Q Was any of this kind of information given to you by Miss Gutierrez in her list of seven?

A No, it wasn't. That's why I say we went down there to interview the individuals and gather some facts.

Q Are warrants ever issued on the basis of tips from people who are not employees of the Service?

MR. LEADBETTER: I'm going to object to that. Your Honor. He's asking for something that I believe is beyond the scope or the authority of this particular investigator. He can testify as to his particular warrants. But I think it's beyond the scope of his authority —

THE IMMIGRATION JUDGE: So, Mr. Haffer, limit the question to as far as Mr. Eddy's knowledge.

BY MR. HAFFER:

Q As far as — to your knowledge and your experience

MR. LEADBETTER: I'm going to object again to that. He can ask as to his own personal knowledge about his warrants.

MR. HAFFER: That's what I said. "As far as you know from your experience."

MR. LEADBETTER: Will you rephrase —

THE IMMIGRATION JUDGE: You are not listening to Mr. Haffer, Mr. Leadbetter.

MR. HAFFER: I used the words "personal experience," Mr. Leadbetter.

MR. LEADBETTER: All right. If you'll rephrase it again, the Government will have no objection.

THE IMMIGRATION JUDGE: Go ahead, Mr. Haffer. Rephrase it again.

BY MR. HAFFER:

Q As far as you know of your personal knowledge and personal experience and your work as an investigator for the Immigration Service, have warrants been issued on the basis of information from informants as opposed to information from Immigration Service employees?

A Not in my experience. Not with just the receipt of a name.

Q What was the information you had from Miss Gutierrez?

A A name, seven names.

Q And nothing else?

A Nothing else.

Q Not where they came from?

A That they were from Mexico.

Q Also where they were working?

A That's correct.

Q No other information besides that? Just the name and where they were working?

A That's correct. Obviously, Gloria Gutierrez was not in a position to make a determination as to whether or not a person is illegally in the United States. She's not a Service officer. She is — you know, we make that determination, not the informant.

Q Do you know whether Gloria Gutierrez had any relationship with Transco?

A I have no idea.

Q One last series of questions I have here. You testified that Mr. Bradley tried to interfer[e] with — seemed to try to interfere with the arrest of the respondent. Is that correct?

A Yes. Mr. Bradley did interfere with our arrest of Mr. Lopez.

Q But you nonetheless arrested Mr. Lopez?

A That's correct.

Q You testified previously that you believed that immigration officers have the right to enter onto private property or private areas without a warrant, without probable cause. That's also correct, is it not?

A That is correct.

Q The situation where the owner of private property tells you that you cannot enter or that you cannot conduct your business there on private property, what is then your feeling as to your powers as an immigration officer?

A I cannot answer that in a yes or no format. I would have to explain the entire situation, Mr. Haffer.

Q Please do.

A Okay. The door was wide open. There were no "no trespassing" signs. I immediately assumed that an individual who wanted to have his transmission repaired would enter the same door we entered. We did not observe an office. There were no — we did not observe an office. Mr. Bradley acknowledged our presence. Perhaps he waved, perhaps he nodded. I can't recall at this time. When I approached Mr. Bradley and he advised us that he would not permit interviews, we were — the employees of the firm by that time knew we were immigration officers. There didn't seem to be any other alternative. It wasn't a question of our power and authority. We were inside at that time.

Q Well, I can understand that. But, obviously, when you entered, before you entered you knew that — potentially knew the reason you were there, I believe, was to investigate the existence of illegal aliens in that job. That's correct, is it not?

A That's correct.

Q Do you know if it is possible to obtain a warrant from the District Director of the Immigration Service to conduct entry onto private property?

A From the District Director?

Q Or from anybody.

A Yes, it is.

Q Who do you obtain the warrant from to do that?

A United States Attorney and the United States Magistrate.

Q Did you attempt to obtain a warrant from the United States Attorney or the United States Magistrate in this case?

A No. We didn't know there were illegal aliens down there. We had information there were and we went down to ascertain whether or not there were in fact illegal aliens.

Q You had specific information. I believe you said you had the names of seven people, the actual names of seven people given to you by an informant.

A Right.

Q You had called back the informant and indicated that you accepted or trusted her veracity or truthfulness in your second conversation you had with her. Is that correct?

A That's correct.

Q Did you think there was probable cause at that time to ask for a warrant to search or enter onto the private property in search of illegal aliens?

THE IMMIGRATION JUDGE: Do you mean before he went to the premises?

MR. HAFFER: Before he went to the premises.

WITNESS: We cased the place, so to speak on August 2nd. It looked like a public establishment. We did not feel we had enough information to obtain a search warrant to enter.

BY MR. HAFFER:

Q What sort of information would you need to obtain a search warrant to enter the premises? What sort of information above and beyond what you had here, that is, the names of seven alleged undocumented immigrants, specifically named, from a specific country, and a specific employment, locality? What else would you need?

A I'd like to have another source confirming Gloria Gutierrez's statements.

Q Did you ask Gloria Gutierrez for another source?

A No, I did not.

Q So what else? That's all else? The only additional information you need is another source?

A Before I make an affidavit, I would like to verify through other means just exactly who was working in the establishment, whether they were probably illegal aliens, either confirm the names.

Q How would you ever confirm the names without going there, creating a situation which you alleged existed here, that people would then be liable to escape?

A I've never personally applied for a search warrant, Mr. Haffer. I really don't know what it entails.

MR. HAFFER: I have no further questions.

THE IMMIGRATION JUDGE: Do you have anything of the witness, Mr. Leadbetter?

MR. LEADBETTER: Yes.

THE IMMIGRATION JUDGE: Before you proceed, Mr. Leadbetter, we will take the morning recess.

The hearing is resumed. You may proceed, Mr. Leadbetter.

MR. LEADBETTER: Thank you, Your Honor.

BY MR. LEADBETTER:

Q Mr. Eddy, you've testified that you went by the establishment, this transmission company, in San Mateo, on August the 2nd, 1976. Is that correct?

A That is correct.

Q When you went by, did you look into the business and what did you see?

A We cruised by the front of the establishment, the main street there I believe was Fifth Street, the large garage door was opened, which is one of these roll-up affairs, several feet wide. There were individuals milling around out in front, going back and forth between the interior and exterior of the enterprise.

Q Was there any sign over the door, the big door, identifying the business or anything?

A I don't know if it was directly over the big door, but there was a sign identifying the business as Transco.

Q You say side by side with the big door there's a smaller door?

A That is correct.

Q Did this smaller door just say "customers only," "keep out," or "do not enter"?

A Well — no, it doesn't. I don't know what it says on the front of the door, but I have to emphasize that both times we saw the door it was opened and the front of the door was not visible.

Q On the day in question, that'd be August 3rd, 1976, when you entered, do you remember, at the time you entered, did you look around for somebody to come forward to you when you first entered?

A Yes, I did. We both did.

Q Describe again what transpired thereafter.

A We walked in, looked around, everybody appeared to be dressed the same, everybody was apparently engaged in some kind of work on either machines or whatever. We looked for an interior office. We did not see one. Shortly after we entered, a man, who later identified himself as Art Bradley, acknowledged our presence by nodding or waving. I don't recall what the gesture was at this time.

Q Now, when Mr. Bradley first came up and you engaged in conversation, did you identify yourself to Mr. Bradley?

A Mr. Bradley never did come up to us. We waited for approximately two minutes after he acknowledged our presence. We assumed he expected us to walk over to him. So after milling around there, not knowing what to do, I decided to approach Mr. Bradley. We stood by the door waiting for him to come up to us. He never did come up to us. I approached Mr. Bradley and identified —

THE IMMIGRATION JUDGE:

Q What did you mean when you said, "after milling around"?

A We stood around in front of the door.

Q Is that what "milling" means to you?

A Well — okay. Yes. We were — you know, we didn't know what to do, we had our hands in our pockets, we were looking around, we couldn't take any action.

Q "Milling around" to me implies a lot of movement.

THE IMMIGRATION JUDGE: Go ahead, Mr. Leadbetter.

WITNESS: We were not moving. We stood by the door.

THE IMMIGRATION JUDGE: That is what I thought you said the first time. That's why I asked you that. You used a word which has a different meaning from what you intended.

BY MR. LEADBETTER:

Q I want you to again state to the Court, to the best of your recollection, the exact conversation you had with Mr. Bradley, when you identified yourselves as immigration officers.

A Okay. I approached Mr. Bradley, I identified myself, presented my Service credentials, with a smile on my face and in a friendly manner I said, "My name is Robert Eddy, Investigator, with the United States Immigration and Naturalization Service. The man over by the door is James Robert Elder, Investigator, with the United States Immigration Service. We have this list of names provided to us by a confidential informant. We would like to interview these individuals and determine whether or not they are illegally in the United States." Mr. Bradley stated then and there that, no, we would not interview his employees at that time. He suggested that we come back at noon when they were eating lunch and interview them at that time. The gist was, he did not object to the interviews. He objected to us interviewing them on work time. I advised Mr. Bradley in a friendly manner that from past experience I knew that these individuals, if illegally in the country, would not be in the establishment at noon, that they — that if they were illegal aliens they would abscond, especially since the conversation was overheard by the individuals in the establishment. Mr. Bradley insisted that we do not interview his employees at that time. I insisted we would interview them at that time because they would not

be here if they were illegal aliens at noon. I terminated the conversation by simply walking away from Mr. Bradley.

Q Have you in the past conducted interviews in businesses similar to that as the transmission company, similar layout?

A Yes, I have.

Q What kind of business?

A Oh, I'm sure at one time or another I've been in another transmission shop somewhere. I can't recall immediately. But a foundry could be described as being similar to this type of layout.

Q At the time that you made your initial entry on the foundry premises on another occasion and a foreman or someone came up, what transpired?

A When — as a matter of courtesy, we always try to go to an officer or approach the foreman or somebody in charge, let them know what we're doing. Generally, I've never had a person object. I usually invite the foreman or somebody in charge to accompany us as we conduct the interviews in this type of situation. I've never been faced with an objection before.

Q Now, did Mr. Bradley at that time make any statements as to he would gladly cooperate with you at lunch time or he'd give you a list of his employees at lunch time or come back at lunch time?

A No, he didn't. He just suggested that we leave the premises immediately.

Q When you walked away from Mr. Bradley you walked over in the direction of the respondent. Is that true?

A That is correct.

Q When you approached him and first asked any questions in the interview, did you speak English or Spanish?

A Well, personally, when I approach somebody, no matter who they are, I identify myself in English and I give them my name in English, and if the person does not appear to comprehend what I'm saying, I repeat the question in Spanish, I repeat the statement in Spanish.

Q In this particular instance, after you repeated the initial in English and didn't get a response, did you start to speak Spanish?

A Could you repeat the question, please?

Q At the initial interview with the respondent, when he didn't answer your questions in English, did you then start to speak Spanish?

A Yes, I did.

Q Now, if he had ignored you totally and had just walked away from any of your interview, what would you have done?

A Well, I would not make any effort to persuade him to answer my questions. I would have to terminate the interview.

Q But this didn't occur?

A This did not occur. The respondent voluntarily answered my questions.

Q When you determined that in fact he was from Mexico, had no close family ties, you advised him that you were going to place him under arrest, did Mr. Bradley come over to you, or where was Mr. Bradley at this time?

A Mr. Bradley was engaged in conversation with Investigator Elder, as far as I could see. My back was to both of them. When I turned around, they were engaged in some kind of conversation.

Q Did you ask the respondent to come with you?

A Yes, I did.

Q Did he make a motion—did he start to move with you?

A Yes, he did.

Q Then what transpired?

A We walked by Mr. Bradley and Investigator Elder. Mr. Bradley engaged me in some kind of conversation, or I think James Robert Elder stated that — what I already knew, that Mr. Bradley would like us to leave the premises immediately. I said, "Okay, we're leaving the premises" — at that time we wanted to avoid an incident — "but Mr. Lopez is under arrest and he's going with us."

Q Where was Mr. Bradley? Was he in front of you or behind you?

A Okay. When I was talking — making my statement that Mr. Lopez was going with us, Mr. Bradley stepped be-

tween myself and the respondent and said that we weren't going to take his employee with us.

Q What was his stance as far as his physical stance at that time and standing in front of the alien?

A Well, when we first began this part of the conversation here, he was simply standing between myself and the respondent. I attempted to persuade Mr. Bradley to not cause any problems; we were going to leave the premises but that Mr. Lopez was going with us. Mr. Bradley said, absolutely not, that we weren't going to take him without, quote, a court order, unquote. Mr. Bradley — I advised Mr. Bradley that, well, we were going to take him whether he approved of it or not. He continued to object. He braced himself for a fight, stood there with his fists clenched. I likewise prepared myself for a confrontation.

Q Now, in your statements to Mr. Bradley about taking the alien, did you become emphatic?

A Yes. I became very emphatic. This all transpired over, I would say, two minutes, which was quite a lengthy period of time, you know, for this type of confrontation. We wanted to avoid an incident. We didn't want a fight. We didn't want any problems. We advised Mr. Bradley that we — if he continued to interfere, we would arrest him. I said, "Look —" I poked him on the chest with my finger. I said, "Look, Bradley, move. We're taking him out. We don't want to be involved in this. Neither one of us wants to be involved in a fight. Move."

Q Did Mr. Bradley move?

A No, he didn't.

Q Who took the alien out from behind Mr. Bradley?

A Okay. I say that — Mr. Bradley is kind of a stocky individual. I didn't particularly care to be involved in any kind of physical confrontation with him. So, when I realized he wasn't going to move, I said, "Okay —" Bob Elder, James Robert Elder was standing by my side. I said, "Okay, Bob, you go around behind him and drag out the alien," who was at that time refusing to come with us also. I said, "Drag him out from behind and I'll make sure that this guy doesn't clobber you in the meantime."

Q What did the alien state as to — in front of you, when Mr. Elder went to get him?

A The alien stated — it appeared to me he was kind of confused as to what to do here. We were telling him what to do and the boss was telling him what to do, and he said, no, and in sort of broken English, as I recall, "I'm going to stay here with my patron," which is "boss."

Q Now, did at any time you or Mr. Elder either draw your weapons or show your weapons?

A No, we did not.

Q Did you have handcuffs, if necessary, available?

A Yes, I did.

Q Now, Mr. Eddy, at the time the first notice came to your attention from a Gloria Gutierrez regarding the suspected aliens being in the United States and then ultimately your calling, did you have any further information come to your attention concerning this list of —

THE IMMIGRATION JUDGE: Mr. Leadbetter, you are just going over the same thing Mr. Haffer did. Is this what you call —

MR. LEADBETTER: This is important, Your Honor, as to, in effect, getting into the area of the search warrant.

THE IMMIGRATION JUDGE: Is it necessary to repeat the same questions Mr. Haffer asked and Mr. Eddy answered?

MR. LEADBETTER: No, Your Honor.

BY MR. LEADBETTER:

Q Did you know Gloria Gutierrez personally?

A No, I don't, Mr. Leadbetter.

Q Have you ever met her personally?

A No, I haven't.

Q The only conversation was on the telephone?

A That is correct.

Q Would you advise the Court as to what is necessary, to your knowledge and belief, to obtain a search warrant.

A Okay. To my knowledge and belief, we've all talked about search warrants, you know. It appeared that it would entail my going to, or entail my making an affidavit of some kind which I, you know, would outline my evidence or probable cause. I simply did not have enough information in this

case to go in and make out an affidavit. Obviously, because a person speaks Spanish doesn't mean he is illegally in the United States.

THE IMMIGRATION JUDGE:

Q Do you mean that you reached that conclusion after you had spoken to Lopez?

A What conclusion are you speaking of, Your Honor?

Q The one that you just said; Obviously, because he spoke Spanish doesn't mean —

A I said, in order for me to go out and swear to an affidavit, I want to be convinced myself. I'm not going to swear to something unless I personally am convinced of the —

Q Mr. Leadbetter was asking you about what you needed for a search warrant, not for a warrant of arrest.

A That's what we're talking about, I assume. To my belief, to my knowledge, I assume that I would have to execute an affidavit.

Q I would like to know why you didn't apply for a search warrant either before you went to the premises or after Mr. Bradley refused you access to them.?

A Well, the information, Your Honor, came from one Gloria Gutierrez. I have no idea who that individual is. I talked to her one time on the phone. She said that there were seven illegal aliens employed by Transco. That isn't enough information to convince me that I'm going to execute an affidavit that there are seven illegal aliens. I want to be convinced myself before I'm going to execute any kind of affidavit.

Q Is it correct, then, you thought you had better go there and investigate the matter?

A That is correct.

THE IMMIGRATION JUDGE: Go ahead, Mr. Leadbetter.

BY MR. LEADBETTER:

Q Now, Mr. Eddy, would you also have to have particular information before you swore to an affidavit on an arrest warrant?

A Yes, I would.

Q And based upon this information from Miss Gutierrez, did you feel you had sufficient information?

A No, I did not.

THE IMMIGRATION JUDGE:

Q I'm still puzzled. Did you think you had sufficient information to question people on the basis of questioning people?

A I felt that I had sufficient information to have cause enough to engage somebody in a casual conversation to ascertain certain facts.

THE IMMIGRATION JUDGE: Go ahead, Mr. Leadbetter.

BY MR. LEADBETTER:

Q Had you ever been at this transmission shop before, Mr. Eddy?

A As I said previously, I was there on August 2nd, 1976, but we did not enter the establishment.

Q I'm talking about either prior to August 2nd or 3rd. Had you ever made an arrest there?

A No, I had not.

Q Had you ever had any information about this organization employing illegal aliens?

A No information had come to my attention of that nature.

Q Now, specifically, did Mr. Bradley indicate to you that he wanted a court order to interview the witness — I'm sorry, to interview his employees on company time, whereas he didn't care what they did at lunch time? Is that correct?

A He indicated to me we could return at noon when his employees would be eating lunch and interview them at that time.

Q But he didn't say it would have to take place outside; he didn't say it could be inside or outside?

A I interpreted his remarks — I construed his remarks to mean we could return when the individual was not actually working on company time and interview them anywhere we chose.

Q Whether it'd be inside the plant or outside?

A Inside or outside.

MR. LEADBETTER: I have no further questions at this time.

THE IMMIGRATION JUDGE: Do you, Mr. Haffer?

MR. HAFFER: I have a few to follow up some of the answers to Mr. Leadbetter's questions.

BY MR. HAFFER:

Q You stated that you previously conducted interviews in similar locations, and you gave an example of a foundry.

A Right.

Q I assume by that that the inside of this shop had a similar appearance or layout as the foundry?

A Yes. It's very similar.

Q You also stated that when you went to the foundry or factory or transmission company that as a matter of courtesy you went to the person in charge, the foreman, whatever —

A That is correct.

Q — to tell him you were there.

A That is correct.

Q Was the only reason you went to the person in charge a matter of courtesy or also a matter of law?

A It's a matter of courtesy since from what we could see this establishment —

Q I'm speaking of previous situations, the foundry. You wouldn't consider a foundry to be a public area, would you?

A It was a matter of courtesy, Mr. Haffer.

Q So you didn't think you had to do that legally, but just as a matter of decency or courtesy.

A We have to get more specific here. I can't answer that question. It depends on the exact situation.

Q You testified that in your experience nobody ever denied you permission before to interview employees.

A That's true.

Q You also testified you went as a matter of courtesy to the foreman or to the boss or whoever, and you gave an example of a foundry you apparently had gone to. My question is whether or not you went to them only as a matter of courtesy or whether you went to them because you thought you had to under the law.

A No. I don't have to. As a matter of law, I advise somebody that I'm going to enter their premises.

Q So, you testified you entered a foundry, went directly to the employees without talking to anybody in charge and interviewed them without cause, apparently, about their immigration status in the United States.

A That's not what I testified. I stated that as a matter of courtesy I would go to the foreman; if the foreman was half-way cooperative and agreed to confirm or acknowledge in some way that these individuals were there, he would make arrangements for us to interview them.

Q You keep on saying "as a matter of courtesy." Let's say, for example, one day you don't feel like — you don't think courtesy is important, you think — you knew the foreman is a person you couldn't deal with, like Mr. Bradley, who would not give you permission to interview his employees and would cause some problems.

A I would have taken the same action, Mr. Haffer, as if this was a public establishment.

Q But the point is, you would do it out of a matter of courtesy, not as a responsibility, a legal responsibility that you feel you have.

A If it was a private area, I would have sought permission—

THE IMMIGRATION JUDGE: Wait a minute. Let me interrupt here.

Q What do you mean by "private" and "public area" in this context? You've got me puzzled. Do you mean that if a shop is opened you can walk into any part of the shop? I'm asking Mr. Eddy that.

A No. If I had walked into the office and the office was obviously separate from the shop area and there was a sign saying "authorized personnel only," I would not in that case have gone into the shop and started interviewing the employees.

Q But because you didn't walk into an office, you walked in through this opened door in Transco, you thought that you could go anywhere in that shop?

A There was no one telling us not to when we walked in. There were no signs instructing—

Q Did you think that Transco was a public place, the entire premises of Transco?

A When we entered the door, the area inside the door was a public place, yes. The place where we were, I would describe as being a public place.

Q How about the place where Mr. Lopez-Mendoza was, that is, the person working who turned out to be Mr. Lopez-Mendoza? Was that also a public place where he was working?

A It's one big room, Your Honor.

Q It is true that these photographs are not in evidence yet. But assuming that these photographs, which I have marked Respondent's Exhibits "A" and "B" for Identification, are photographs of Transco, take a look at Exhibit "B" for Identification. Would you say that that represents — that that is a photograph of a public place?

A If the photograph was taken from immediately inside the door. It could have been taken from immediately inside the door. Anybody exiting or entering the premises would have to enter into this type of situation.

Q You thought you were free to go anywhere portrayed by that photograph, Respondent's Exhibit "B" for Identification? Is that your testimony?

A After we had entered the place — we were already in the establishment and had already proceeded into the interior of the building to talk to Mr. Bradley. We were there for a specific reason. I felt that I was completely within my authority to be within that establishment at that time.

THE IMMIGRATION JUDGE: Go ahead, Mr. Haffer.

BY MR. HAFFER:

Q Just one brief question. I believe you testified previously that Mr. Bradley was about ten yards or thirty feet inside the door.

THE IMMIGRATION JUDGE: No. He testified that Mr. Lopez was ten yards from Mr. Bradley.

BY MR. HAFFER:

Q Let's clarify that. Exactly how far from the door was Mr. Bradley when you went to talk to him?

A Okay. I really can't recall the exact layout of the operation. But Mr. Lopez was closer to the door and closer to us than Mr. Bradley was.

Q Let's go back again. Approximatley how far from the door was Mr. Bradley, or Mr. Lopez, either one, if you can recall?

A I would say probable ten or fifteen yards.

Q Okay. A couple of other questions I have. You indicated also, I believe, in your answer to a question by the trial attorney, that if Mr. Lopez had refused to answer your questions, had turned his back and had walked away, you would have left and called it a day. Is that correct, as far as Mr. Lopez is concerned? You wouldn't have arrested him, in other words?

A I wouldn't have pursued the conversation at that time.

Q Would you have arrested him at that time?

A No, I wouldn't have.

Q You would have let him go back to his work and would have left the company, or Transco, without arresting him?

A That is correct. I had no idea who Mr. Lopez was without his answers. I have nothing if he doesn't want to answer my questions.

Q If his name had appeared on the list of seven that you had, would you also have not arrested him if he refused to answer?

A I would not have pursued the conversation.

Q You would not have arrested him?

A That is correct.

Q So your testimony is, his answers to your questions were voluntary?

A That is correct.

Q Did you inform him of this, that it was voluntary?

A No, I identified myself, I asked him his name, whether or not he was an alien, where he lived.

Q So you don't know whether he thought they were voluntary or not?

A It doesn't matter. It's irrelevant.

Q If it was irrelevant to you, do you think it was irrelevant — I withdraw that question. You will agree, however, that the question of whether anything is voluntary, it's important to understand or know that the person thinks whether it's voluntary or not.

MR. LEADBETTER: I'm going to object to that, Your Honor. I think we're getting into an area of psychiatry here as to what he thinks.

THE IMMIGRATION JUDGE: No, Mr. Leadbetter. You are overruled.

MR. LEADBETTER: He's going to testify as to what somebody thinks.

THE IMMIGRATION JUDGE: That isn't what he asked him. Again, you're not listening to the question. As I understood it, it was, don't you think it's important for the person to feel that his answers are voluntary? Isn't that what you asked him, Mr. Haffer?

MR. HAFFER: The question, more or less, that I asked was — the point that I'm trying to make is that the issue is the point of view of the person who is being asked.

THE IMMIGRATION JUDGE: Right. That's what I thought.

MR. HAFFER: It is whether they know it is voluntary or not that mattered. He testified previously that it didn't matter. I just want it clarified that it does matter.

THE IMMIGRATION JUDGE: It has nothing to do with psychiatry, Mr. Leadbetter.

MR. LEADBETTER: I'm talking about a feeling.

MR. HAFFER: I don't want to pursue this. I'm not concerned about it. I just wanted —

THE IMMIGRATION JUDGE: He wants to know, as I understand it, whether Mr. Eddy feels it is important for the person he is questioning to realize that he may refuse to answer if he wishes to. Isn't that what you're after, really?

MR. HAFFER: That's fine.

BY MR. HAFFER:

Q Is there anything Mr. Lopez did or said which indicated to you that he thought the answers were being answered voluntarily?

A He answered the questions readily. I was not interrogating Mr. Lopez. I was engaging him in a casual conversation. I asked him — I said, "Do you mind if I ask what your name is, where you're from?"

Q You were asking him questions for the purposes of an immigration investigation, were you not?

A Yes, I was.

Q You were passing the day, asking on a purely social level, were you?

A No, I was not.

Q So, in fact, although, perhaps, your approach was one of — it was a soft approach, in fact you were asking him questions in the furtherance of an immigration investigation.

A That's correct.

Q One last series of questions I have is about the question of a search warrant. You testified, I believe, that you didn't believe you had enough information to apply for, or sign an affidavit, an application for a search warrant. Is that correct?

A That's correct.

Q Did you talk to anybody in the Immigration Service about whether or not you had sufficient information?

A Well, nobody is going to convince me to execute an affidavit unless I'm convinced myself, Mr. Haffer. I didn't discuss it with anybody else because I knew there wasn't sufficient information.

Q What information do you need for a search warrant?

A I would want some kind of overwhelming proof that would convince me that — somebody I knew, for instance, somebody I had handled before, or somebody that I could pull out a prior record of apprehension and say, yes, this is Adan Lopez, I knew that person to be working at Transco Transmission Company on a prior occasion. I knew him to be an illegal alien on a prior occasion. That is sufficient cause.

Q Do you believe you require the same amount of cause for a search warrant as for an arrest warrant?

A No, I don't.

Q What is the difference?

A I didn't think the case warranted a search warrant. I was going down there to interview these people. I expected them to, you know, say, "Sure, I'll talk to you, I'll answer your questions." I wasn't going down there to arrest them or bust down the door. I was going down to talk to some people. Mr. Haffer.

Q The fact that there were seven illegal aliens there, you knew that probably —

MR. LEADBETTER: I object to that, Your Honor. Mr. Haffer said that there were seven illegal aliens. Well, unless Mr. Haffer knows something we don't that there were in fact seven illegal aliens—

THE IMMIGRATION JUDGE: Why do you object to that?

MR. LEADBETTER: Because before he had stated — made an issue about how many people were there.

MR. HAFFER: He had a list saying that seven illegal aliens were working there.

MR. LEADBETTER: They were working there?

MR. HAFFER: No. He said he had a list.

MR. LEADBETTER: He suspected. He didn't know.

MR. HAFFER: I will rephrase my question.

BY MR. HAFFER:

Q If you went to Transco with a list of seven and you found, hypothetically found seven alleged or suspected illegal aliens working there and you went there for the purpose of conducting — questioning and entering on the premises, you knew, did you not, that you probably were going to be making arrests?

A That is correct.

Q So, in fact, you were aware that if this information was correct, even in part correct as far as the numbers were concerned, that you were going to be making arrests when you entered Transco?

A No, I did not. I really can't see that those two questions follow one another.

THE IMMIGRATION JUDGE:

Q Why did you go there?

A I went down there to interview people to ascertain the validity of the information provided by Gloria Gutierrez.

Q What Mr. Haffer seems to want to know is—

A I had no idea who was there.

Q I realize that. But you went there because you must have thought they might be there. Didn't you realize that if they were there you would have arrested them—

A No.

Q — if they were illegal aliens?

A I'd say fifty per cent of our encounters with illegal aliens we probably do not arrest. They do not involve arrests whatsoever in fifty per cent of my personal encounters with illegal aliens.

Q Do you mean if they had family ties or something?

A That's true. I was going down there to interview some people.

BY MR. HAFFER:

Q But if there were seven illegal aliens you would have arrested half of those. Is that correct?

THE IMMIGRATION JUDGE: What difference does that make, Mr. Haffer?

MR. HAFFER: The difference is—I want to try to establish for the record the fact he had reason to believe he was going to be making arrests when he went down to Transco.

WITNESS: I had reason to believe there were illegal aliens.

BY MR. HAFFER:

Q What is the difference between the probable cause required for a warrant of arrest and the probable cause required for a search warrant, as far as you know?

A I don't know.

THE IMMIGRATION JUDGE: Mr. Haffer, you are asking him the question. What is required in your judgment for a search warrant?

MR. HAFFER: I think it's quite clear that the information of an informant can be used as the basis for a search warrant. I think in a case where they give the names, the countries of origin and the place of employment with specificity, that a warrant would issue there and I think it is certainly a type of case where even if a magistrate might decide against issuing a warrant, it would be something

where the investigator should be obliged to attempt such a warrant or attempt to obtain such a warrant. I think in this type of case where he especially called back, he talked with the woman again, he confirmed some aspects of the previous information she had supplied to the Service in this case, that type of case is where a magistrate would probably, especially an immigration case, have given him a warrant to search.

THE IMMIGRATION JUDGE: Mr. Haffer, do you feel that more is needed for a search warrant than for an immigration officer to make an arrest without a warrant?

MR. HAFFER: That more is needed for a search warrant than to make an arrest without a warrant? I think the key difference is, an arrest without a warrant is only on the — with the suspicion, with the likelihood that the person is going to escape prior to obtaining a warrant. As you know, the level required — the level of probable cause required for arresting a suspected illegal alien is very low as compared to a criminal case.

THE IMMIGRATION JUDGE: Is probable cause the test?

MR. HAFFER: I think the courts have held that — I think the immigration law itself doesn't say "probable cause." It says "reasonable —"

THE IMMIGRATION JUDGE: "Reason to believe."

MR. HAFFER: But I think the courts have established the difference between "reason to believe," as contained in the immigration law, and "probable cause" is somewhat minimal. They have established, for example, in many cases involving arrest of Spanish-speaking people in the Southwest, there are certain requirements above and beyond the general "reason to believe."

THE IMMIGRATION JUDGE: But, as I remember, the most recent Supreme Court decision deals with "reason to believe" rather than "probable cause."

MR. HAFFER: True, but "reason to believe" is more than just simple reason to believe in layman's terms.

THE IMMIGRATION JUDGE: I realize that. There was an attempt in one of the cases to set forth certain additia [sic], certain elements which would give an immigra-

tion officer reason to believe, which were less than probable cause.

MR. HAFFER: Yes, they were. They were less than probable cause.

THE IMMIGRATION JUDGE: Would you say that for a warrant, a search warrant for immigration purposes —

MR. HAFFER: Your Honor, my point is this —

THE IMMIGRATION JUDGE: Would you — let me ask you this question. Does an immigration officer applying for a search warrant, that is, a warrant which would enable him to go to a certain premise to ascertain whether there were illegal aliens there, does he have to establish probable cause or something less?

MR. HAFFER: No. I think to establish — to apply for both a warrant of arrest and a search warrant, he does not have to establish probable cause.

THE IMMIGRATION JUDGE: I think you are right. I am inclined to agree with you. That's why I asked you the question. I wanted to see your position.

MR. HAFFER: I think the operative point is this. If you have reason to believe, as the cases have established what that means, in an arrest situation, for example, if you have reason to believe a person is here illegally, the only reason which justifies an arrest without a warrant is that they are likely to escape or escape before a warrant can be obtained. The same level of reason to believe can and should be used to apply for a warrant of arrest from the District Director. I think the same thing applies under the holdings in those cases as well as the immigration law itself in applications for a search warrant. I think quite likely even a magistrate in a United States District Court would be more likely to grant a search warrant with even less level of reason to believe than they would require for an arrest warrant because in general criminal and ancillary matters the criminal requirements for search warrants are substantially more liberal.

THE IMMIGRATION JUDGE: Off the cuff, I think you are probably right. Do you have any other questions of Mr. Eddy?

MR. HAFFER: No, I don't.

THE IMMIGRATION JUDGE:

Q Mr. Eddy, one thing I wish you would clarify. I was making notes when you were testifying and I don't have a complete note on this. But you said something that went like this. When Mr. Bradley refused to let you interview his employee, there didn't seem to be any alternative. What did you mean by that?

A If we left the establishment at that time that we'd never talk to the same individuals again.

Q In other words — you also said something about everybody had heard what had been going on between you and Bradley. Did you feel then that if there were illegal aliens there, they would abscond between the time you left and the time you came back at the lunch period?

A That is correct.

Q So you decided to go ahead and interview as many as you could?

A That is correct. However, we only interviewed one. We wanted to avoid an incident.

Q If you wanted to avoid an incident, why did you interview the one?

A It's our job.

THE IMMIGRATION JUDGE: Are there any other questions by either side of this witness?

MR. HAFFER: I have one question, which you reminded me of.

BY MR. HAFFER:

Q You did testify that Mr. Bradley had given you an indication that if you came back at noon you — he would not object. Is that correct?

A That is correct.

Q This was approximately 8:00 o'clock in the morning, or in the morning sometime?

A Somewhere between 7:00 and 8:00 o'clock. I don't know the specific —

Q When you were in the building, did you know how many entrances and exits there were to the building?

A We did our best to case the place the day before. As far as we could tell, there was only one access and that was — well, two accesses, front doors.

Q Why didn't you go out and wait outside until noon? You would have been able to see who was coming out.

A It was 8:00 o'clock in the morning. I didn't feel like waiting four hours.

MR. HAFFER: I have no further questions.

THE IMMIGRATION JUDGE: Do you, Mr. Leadbetter?

MR. LEADBETTER: Yes, Your Honor

BY MR. LEADBETTER:

Q Mr. Eddy, based upon a telephone call from a person giving a list of names of aliens, would that be, in your opinion, sufficient to go to the United States magistrate for either a search warrant or arrest warrant?

A No.

MR. LEADBETTER: No other questions, Your Honor.

THE IMMIGRATION JUDGE: You are excused, Mr. Eddy.

What do you wish to present next, Mr. Haffer?

MR. HAFFER: May I ask a question? How long are we going to go on? Until noon or —

THE IMMIGRATION JUDGE: What do you want to present?

MR. HAFFER: I want to bring on Mr. Elder. It shouldn't take very long.

THE IMMIGRATION JUDGE: Why don't you start with him and we'll see.

Q What is your full name?

A James Robert Lee Elder.

Q To be sworn, stand up, please, and raise your right hand. You do solemnly swear that everything you say at this hearing will be the truth, the whole truth, and nothing but the truth, so help you God.

A I do.

THE IMMIGRATION JUDGE: You may be seated.

Proceed, Mr. Haffer.

BY MR. HAFFER:

Q Investigator Elder, on August 3rd, 1976, did you appear at the offices of Transco in San Mateo, California?

A Yes.

Q Did another officer of the Immigration Service accompany you at this time?

A Yes.

Q Who was that?

A Investigator Robert Eddy.

Q About what time did you appear at the offices of Transco in San Mateo?

A Approximately 7:45 a.m.

Q When you were at the premises of Transco, did you arrest the respondent seated next to me?

A I was part of the arrest.

Q You and the other investigator, Eddy. Is that correct?

A That's correct.

Q He was taken into custody at that time, though?

A That is correct.

Q When you went to Transco, were you in possession of the respondent's name or any information concerning this particular respondent?

A We were in possession of several names.

Q Was the respondent's name among those, do you know?

A The name the respondent gave us was not among the names that we had, no.

Q Do you know how the information was received by the Immigration Service?

A Yes.

Q How?

A An individual called by telephone to inform us that Transco had employed a number of illegal aliens from Mexico.

Q But did — were you involved in that contact with the informant?

A Not directly, no.

Q When you entered the premises of Transco, did anybody from the company greet you at the door?

A No.

Q Did you walk in the door?

A We walked through the door.

Q Was the door opened or closed?

A It was opened.

Q After you entered the premises, what did you do?

A We both, that is, I — Mr. Eddy and I waited near the door in view of all the employees in the premises and waited for someone to come and help us.

Q How long did you wait?

A In my estimation, about five minutes.

Q Did anybody inside the company indicate that they knew you were there or tell you to wait or tell you to come forward or in any way recognized your presence?

A Someone recognized our presence, yes.

Q Do you know who it was?

A At the time I did not know who it was. However, an individual, who — I later found out his name.

Q What is his name?

A Mr. Art Bradley was — identified himself later on by that name.

Q What did Mr. Bradley do as far as recognizing your presence?

A He looked at us, continued to work and made a nodding, or, at least, a motion toward us that he recognized we were on the premises.

Q Did he — how far away from you was he at that time?

A He was about thirty-five or forty feet.

Q Did he motion you to do anything?

A No. He just motioned at us that he recognized us and so we continued to stand near the door hoping that he or some other individual would come over and greet us.

Q Was he working on a machine at the time?

A I couldn't tell, exactly, what he was working on. He evidently was busy standing next to another employee at some type of work.

Q And both you and Investigator Eddy were dressed in street clothes?

A Yes. That's correct, as we were dressed with sport coats, slacks, ties, shirts.

Q So as far as you know, neither Mr. Bradley nor anyone else in the establishment knew you were from the Immigration Service?

A We didn't identify ourselves to anybody. We just merely stood by the door.

Q How long — you said you waited about five minutes by the door. Is that correct?

A Approximately.

Q Then what did you do?

A I continued to stand near the door and Investigator Eddy walked over to Mr. Bradley and at this point I'm not completely sure of all that took place because it was noisy inside of the building. But, at any rate, he apparently was talking with Mr. Bradley.

Q You stayed by the door during this time?

A I was near the door, yes.

Q How far from the door were you?

A About ten feet, twelve feet.

Q You eventually left that position by the door, did you not?

A Yes.

Q Could you describe the circumstances when you left your position near the door?

A I walked a little bit further into the premises as Mr. Bradley was casually walking to my direction.

Q Was Mr. Eddy with Mr. Bradley as he was walking towards your direction?

A No.

Q And then what transpired after you were gradually walking in the direction of Mr. Bradley?

A I identified myself to Mr. Bradley as an officer of the United States Immigration Service.

Q Did you converse with Mr. Bradley then?

A Very briefly. He finally indicated in a subtle, or, at least, a low-key fashion that he didn't appreciate us being there any longer.

Q Did you then approach the respondent in this case, Mr. Lopez-Mendoza?

A No.

Q Did Mr. Eddy approach the respondent in this case?

A Mr. Eddy simultaneously had approached Mr. Lopez.

Q Simultaneously as you were talking to Mr. Bradley?

A Just slightly before I talked to Mr. Bradley.

Q About how far from the door was Mr. Lopez-Mendoza when Mr. Eddy approached him?

A Are you talking about the front door?

Q The front door or the door you entered through.

A Mr. Lopez, in my estimation, was approximately thirty-five feet from the door.

Q Do you have any idea what the size of the entire establishment is?

A I have some idea, but —

Q Was thirty-five feet approximately halfway in the establishment from the door, do you recall?

A I would say thirty-five feet would be approximately one-third to one-half way into the premises.

Q Were you aware that Mr. Bradley or one of his employees was calling in local law enforcement officers in this case?

A Yes.

Q Were you there when he indicated he intended to call the police?

A Yes.

Q Did you comment to him one way or the other whether or not he should call the police?

A Yes, I did.

Q What did you tell him?

A I encouraged Mr. Bradley, or his employee, excuse me, to call the police.

Q Did Mr. Bradley ever ask you for a warrant or for an order from — a court order to enter the premises or to arrest the respondent?

A I don't know if he ever asked specifically for a warrant.

Q Did he mention a warrant or a court order?

A Yes.

Q In what context did he mention it?

A After we had left the premises, or, at least, on the way out of the premises, he mentioned that we should have a warrant, or, at least, some sort of document of this nature to come into his premises.

Q You testified before that Investigator Eddy spoke with Mr. Bradley first. Is that correct?

A That's correct.

Q Could you hear what they were discussing?

A No. It was too noisy.

Q This was while you were still waiting by the door. Is that correct?

A I don't understand.

Q Mr. Bradley and Mr. Eddy had their conversation, their first conversation while you were still waiting by the door. Is that correct?

A That's right.

Q What are the powers of an immigration officer to arrest or make an entry without a warrant?

A Excuse me. I didn't understand your question.

Q What power do you have as an immigration officer to enter a particular place without a warrant?

A We have authority to enter certain dwellings or lands without a warrant.

Q What dwellings or lands are those?

A We can enter public places.

Q Without a warrant?

A Not in all cases, perhaps, but we have — versus entering a private residence, we have more authority to enter public lands or premises.

Q What authority do you have to enter a private dwelling without a warrant?

MR. LEADBETTER: I'm going to object to that question, Your Honor. A private dwelling is not involved here.

MR. HAFFER: He mentioned he had a right —

MR. LEADBETTER: No. He said "dwelling."

BY MR. HAFFER:

Q I'm sorry. What authority do you have to enter a dwelling without a warrant?

A I'm not sure I can answer because that's kind of a broad question without going into kind of a lecture.

Q Well, let's see if we can —

THE IMMIGRATION JUDGE: A dwelling wasn't involved here, Mr. Haffer. Why go into that?

MR. HAFFER: I want to see what his general knowledge is. I was going to try to have him define what a public place is.

BY MR. HAFFER:

Q You indicated you would enter a public place without a warrant.

A Yes.

Q What is a public place?

A It would be a place where the public is allowed to enter.

Q All places where the public is allowed to enter?

A I can't comment on exceptions to the rule.

Q But, as a generalization, a public place would be all places, with some exceptions? But, in general, a public place is a place where the public may enter, all places where the public may publicly enter?

A Yes, as far as I know.

Q Did you assume that this location at Transco was a public place?

A Yes.

Q The entire premises?

A We assumed that as a place of business that it was for the most part open to the public, yes.

Q But you wouldn't consider a factory, for example, to be a public place, would you?

A Well, do you consider this a factory?

Q Transco? Are you speaking of Transco?

A Yes.

Q That is a question I wanted to ask you. Do you consider Transco to be a factory?

A In my opinion, no, it's not a factory.

Q Were there machines in the local [sic] that are used for the repair of certain mechanical parts, transmissions, specifically?

A Yes.

Q There were a number of machines, were there not, in that location when you went there?

A Yes.

Q They were operating?

A Yes.

Q There were a number of employees standing around in certain areas, when you entered, working? Is that correct?

A Yes. That is correct.

Q Is that a factory or not?

A It's a business.

Q Well, then, I'll go even further. Do you consider a business where people are working on machines to be a public place?

A In some cases, yes.

Q In this case?

A Yes.

Q If I may, I'd like to show you Respondent's Exhibits "A" and "B" for Identification and see if you can identify this as the interior of Transco. Does that appear to be the interior of the company in question?

A Without seeing any address or without comparing the photos to Transco in San Mateo, the photographs do resemble the interior of Transco.

Q So, in general, even if you aren't sure it is the exact place, it has the general appearance that Transco had?

A Yes.

Q Would you consider—I'm showing you now Respondent's Exhibit "B" for Identification. Would you consider this to be a public place?

MR. LEADBETTER: I'm going to object to that, Your Honor. Just showing him a photograph and saying nothing more, it could have been a picture of a garage with machines —

THE IMMIGRATION JUDGE: You are overruled, Mr. Leadbetter.

WITNESS: From the photograph I couldn't say one way or the other.

BY MR. HAFFER:

Q Okay. Were you with Investigator Eddy when he, I think he said he cased the establishment on the 2nd of August?

A Yes.

Q What was the purpose of casing the establishment the day before?

A To find out where the establishment was located and to get a general idea of how big it was, what type of force, that is, the amount of men that we would need to do a good

job as law enforcement officers. Also to find out whether or not it's a feasible type of a lead to investigate further.

Q Did you also check out in this particular case how many entrances and exits there were to the establishment?

A Not in detail, no.

Q That wouldn't be part of casing the establishment, to determine the amount of force needed to investigate or to

—
THE IMMIGRATION JUDGE: To what. You didn't finish your question.

BY MR. HAFFER:

Q To investigate, period.

A It could be.

Q Do you happen to know off the top of your head how many doors this establishment has?

A No. I still don't know how many doors the establishment has.

MR. HAFFER: I have no further questions.

THE IMMIGRATION JUDGE: Do you have anything of the witness, Mr. Leadbetter?

BY MR. LEADBETTER:

Q Were you present when Mr. Bradley made any statements concerning a court order or court papers to come on the premises?

A Yes.

Q Did he make any statements regarding — that he wouldn't object, or, really, no comment, if you interviewed people at lunch time rather than on company time?

A I apparently was not directly in conversation with Mr. Bradley when he mentioned that particular statement, if he did mention it.

Q Now, at the time that you physically took the respondent into custody, were you standing next to Mr. Eddy when he was engaged in conversation with Mr. Bradley?

A I'm sorry, but I'm not sure I understood the question exactly.

Q When Mr. Bradley was standing in front of the alien

—

THE IMMIGRATION JUDGE: That hasn't been established from this witness, Mr. Leadbetter. Why don't you start this way.

Q Who took — who arrested Mr. Lopez, Mr. Elder?

A The point at which Mr. Lopez was considered detained and to the point of perhaps being in custody was after Investigator Eddy had talked to Mr. Bradley. Investigator Eddy approached Mr. Lopez alone and brought Mr. Lopez over to Mr. Bradley.

Q Did you then consider that he was under arrest, or detained, as you put it, or did that occur later?

A We were planning on taking Mr. Lopez into our custody and I suppose as a matter of formality we were informing Mr. Bradley of this fact.

THE IMMIGRATION JUDGE: Go ahead, Mr. Leadbetter.

BY MR. LEADBETTER:

Q At this time were you standing next to Officer Eddy?

A At which time?

Q At the time that — after he had accompanied Mr. Lopez over to where Mr. Bradley was standing?

A We eventually were all standing in a small group, yes.

Q What ensued as to the actual taking of Mr. Lopez from the premises?

A Mr. Bradley informed us that he would not allow Mr. Lopez to leave the premises.

Q Where was he standing when he advised you of this?

A In front of Mr. Lopez.

Q What was his stance?

A That's a hard question. Basically he was tense, upset, and he appeared to be in somewhat of a defensive demeanor.

Q Did you notice whether his fists were clenched or not?

A No.

Q All right. Then what transpired between Mr. Bradley and Mr. Eddy?

A Mr. Eddy, that is, Investigator Eddy informed Mr. Bradley that we were planning on taking Mr. Lopez into

our custody and that it would be best if he cooperated with us.

Q Did either you — did either you or Mr. Eddy display your weapons at all?

A No.

Q Did Mr. Eddy at that time make any points emphatically to Mr. Bradley with his finger?

A Yes.

Q What did he do?

A He used his finger as a gesture indicating that Mr. Bradley should not interfere with our duties.

Q Now, at that time, did you feel that Mr. Bradley was interfering with your taking into custody the alien?

A He said that he would not let the alien leave the premises.

Q But all he said was —

MR. HAFFER: Excuse me, Your Honor. I'd like a clarification here. It seems with the last several questions that the point of Mr. Leadbetter is to determine whether or not Mr. Bradley interfered, perhaps criminally interfered with the conduct of the immigration officers. That doesn't seem to have anything to do with whether the entry of the arrest, which had already occurred prior to that time, was legal. I'm wondering what he is getting at. Is he after a determination of whether the entry and the arrest were legal or is he trying to obtain information as to Mr. Bradley's possible criminal conduct?

MR. LEADBETTER: Your honor, if, in fact, Mr. Bradley was engaged in a course of conduct to aiding and abetting or harbouring illegal aliens or interfering, and subsequently this is proven to be a lawful arrest, this could be a matter of public concern.

THE IMMIGRATION JUDGE: This isn't the place to develop that, Mr. Leadbetter.

MR. LEADBETTER: I think it's a proper point to bring out, Your Honor, if, in fact, this is a satellite question. Nonetheless, the officer should testify as to what transpired at —

THE IMMIGRATION JUDGE: Is there an objection, Mr. Haffer?

MR. HAFFER: Yes, there is.

THE IMMIGRATION JUDGE: It is sustained. We are only interested in hearing whether or not there was a lawful search and a lawful arrest.

MR. LEADBETTER: Then I take it the Court is not particularly interested as to what transpired between Mr. Bradley and the officers?

THE IMMIGRATION JUDGE: After the arrest took place.

MR. LEADBETTER: But prior to the arrest? If he made the statement, "you can't take somebody from the premises," of course—

THE IMMIGRATION JUDGE: The question is when. That's what I asked Mr. Elder before, when did he consider Mr. Lopez arrested. It seemed to me from Mr. Eddy's testimony that Mr. Lopez was under arrest when Mr. Eddy walked over to Mr. Bradley with Mr. Lopez.

MR. LEADBETTER: At the time he interviewed him and found out his circumstances he had started to walk —

THE IMMIGRATION JUDGE: He stated he put him under arrest then.

MR. LEADBETTER: That's when Mr. Bradley stood between the —

THE IMMIGRATION JUDGE: That happened after the respondent was under arrest. Isn't that your understanding?

MR. LEADBETTER: Yes. But, of course, I was concerned with as to where he was at this time, because the issue came down as to a confrontation and removing the alien from the premises.

THE IMMIGRATION JUDGE: That's the point to which Mr. Haffer objected. I sustained his objection. I think we've heard enough about that.

MR. LEADBETTER: Yes, Your Honor.

BY MR. LEADBETTER:

Q Now, the question came up about calling the police. Who first mentioned —

THE IMMIGRATION JUDGE: Why is it necessary to go into that again?

MR. LEADBETTER: It is, Your Honor, because the issue has come up as to apparently some type of questions as to going to — not arising — I think it should be on the record as to —

THE IMMIGRATION JUDGE: Why did you ask Mr. Eddy that question, Mr. Haffer?

MR. HAFFER: Because, according to our witnesses, they are going to testify the immigration officers told them not to call the police.

THE IMMIGRATION JUDGE: What difference does that make?

MR. HAFFER: It makes no difference as far as the — as far as the actual arrest and entry. It's just an indication that it seemed to the people involved that the Immigration Service was acting lawlessly.

THE IMMIGRATION JUDGE: What did the police have to do with an immigration arrest?

MR. HAFFER: The respondent — Mr. Bradley wanted to call the police because he felt that there was something illegal going on in the arrest and the entry. But I will stipulate to the fact that they called the police. I don't know if Mr. —

THE IMMIGRATION JUDGE: Why do you want to ask him about that, Mr. Leadbetter?

MR. LEADBETTER: The question is, apparently the officers encouraged calling the police because they felt that with the number of persons there and the particular stance of Mr. Bradley that they were fearful of a potential assault on their persons as officers, Your Honor, and they welcomed the San Mateo County Police coming because of this.

MR. HAFFER: But Mr. Bradley was calling the police.

MR. LEADBETTER: They — in effect, the officers wanted that because at that time they were concerned for their personal safety as being assaulted by either Mr. Bradley or by the other employees in the shop.

MR. HAFFER: They left prior to their coming.

MR. LEADBETTER: It's a question as to encouraging the man to call the police and I think that is —

THE IMMIGRATION JUDGE: Mr. Leadbetter, Mr. Elder already testified, if I remember correctly, that he wanted Mr. Bradley to call the police.

MR. LEADBETTER: He never stated as to why. Your honor. I think it should be on the record.

THE IMMIGRATION JUDGE: Let it be on the record, then.

BY MR. LEADBETTER:

Q Mr. Elder, getting into the area, again, as to calling the police, who first suggested that the local police be called?

A Mr. Bradley.

Q Do you recall his words, the statements he said?

A "I'm going to call the police."

Q Who did he say that to?

A To us, to Investigator Eddy and myself.

Q What was your reply to Mr. Bradley's statement?

A I told him to please call the police, most emphatically.

Q Why were you so emphatic in wanting the local police there?

A Because of the fact that it looked like an incident would soon arise and if the police would come I thought it would calm the situation down.

Q What particular incident would arise?

A Mr. Bradley was very — well, he had a big objection to us taking Mr. Lopez from the premises. He started to get quite angry and, of course, Investigator Eddy was opposed to this way of thinking and Investigator Eddy became emphatic that we carry on our duties. Investigator Eddy and I were the only two investigators there. There was Mr. Bradley, Mr. Lopez, and all the other employees and we had no idea what their opinions or ideas about the entire thing were like. I encouraged him to have the police called.

Q Were you in fear that this would go more than just a verbal argument, that there'd be physical force used upon —

MR. HAFFER: I object, Your Honor. This has nothing to do with the issue we're talking about today.

THE IMMIGRATION JUDGE: You are the one who raised the issue of the police, Mr. Haffer.

MR. HAFFER: But raising the issue of the police I don't think has anything to do with whether or not the officers had the fear —

THE IMMIGRATION JUDGE: I don't think you have to probe this further, Mr. Leadbetter.

MR. LEADBETTER: I'd just like an answer to that question, Your honor.

THE IMMIGRATION JUDGE: You can ask him this. "Was there any other reason why you encouraged Mr. Bradley to call the police, Mr. Elder?"

BY MR. LEADBETTER:

Q Mr. Elder, would you answer?

A Because I felt that we were not against the police being there. We felt that we were within the law and there was no reason to exclude the police if they were asked to come out to the premises.

THE IMMIGRATION JUDGE: Do you have anything else, Mr. Leadbetter?

MR. LEADBETTER: No, Your Honor.

THE IMMIGRATION JUDGE: You are excused, Mr. Elder.

Unless you have something else, Mr. Haffer.

MR. HAFFER: No. I have nothing further.

THE IMMIGRATION JUDGE: You are excused, Mr. Elder.

Before we resumed the hearing after the recess, Mr. Haffer informed me that he would not be available for further hearing till about two o'clock. Is that so, Mr. Haffer.

MR. HAFFER: I indicated two-thirty. But I could probably be back about two-fifteen.

THE IMMIGRATION JUDGE: Two-thirty would be all right. Come back as soon as you can. I have a one o'clock hearing which should be finished before two-fifteen.

MR. HAFFER: Okay.

THE IMMIGRATION JUDGE: One never knows. We will take a recess at this time till two-fifteen.

THE IMMIGRATION JUDGE: The hearing is resumed. Mr. Haffer, before we proceed, I would like you to clarify something. When you were talking during the morning session of this hearing about the Service obtaining a search warrant from a United States magistrate on less than probable cause, were you referring to a criminal proceeding or a civil proceeding?

MR. HAFFER: I was referring to a civil proceeding.

THE IMMIGRATION JUDGE: I assumed that. I just wanted the record to be clear that it's your position they could get such a warrant on less than probable cause.

MR. HAFFER: Yes, Your Honor. If I could briefly summarize it, I think the only analogy we have in the entire federal, or state law, for that matter, is the Public Health Service problem of quarantine for administrative arrests and administrative searches. I think that the magistrate has the power under federal law to issue administrative civil search warrants in immigration cases where the alleged violation is one of the Immigration and Nationality Act civil sections as opposed to criminal sections on less than probable cause. And it appears to me that the level of knowledge which is required would be similar to that required under Section 287 of the Immigration Act for arrest and that is a reasonable belief or reasonable suspicion. I think, obviously, when it comes to a criminal violation of the Immigration and Nationality Act the same level of probable cause is required for issuing a warrant, as for any other criminal case.

THE IMMIGRATION JUDGE: At the time I declared the recess this morning for the luncheon period, you indicated that you wished to present several witnesses, Mr. Bradley and others.

MR. HAFFER: That's correct.

THE IMMIGRATION JUDGE: Before we go to that, will you state for me your contention in this case? You made a motion that the Order to Show Cause should be dismissed and I permitted you to present evidence in support of your motion. What is your contention?

MR. HAFFER: Our contention is as follows. That the entry of immigration officers onto the premises of Transco, where the respondent was employed, and his subsequent

arrest, detention and arrest by immigration officers was invalid, illegal, and that, therefore, this Court has no jurisdiction to hear this deportation proceeding at this time.

THE IMMIGRATION JUDGE: What is the basis for your contention that the detention and arrest were invalid and illegal?

MR. HAFFER: Our contention is that the immigration officers had sufficient time to obtain a warrant for the respondent and failed to do so, and, therefore, the powers given to the immigration officers under Section 287 of the Act to arrest without a warrant were not properly exercised.

THE IMMIGRATION JUDGE: You don't mean a warrant with regard to Mr. Loepz, do you?

MR. HAFFER: I do, Your Honor.

THE IMMIGRATION JUDGE: They didn't know about his presence by name, at least.

MR. HAFFER: In our offer of proof we will show that they did allege that they did in fact know him by name.

THE IMMIGRATION JUDGE: Oh, yes. You did ask Mr. Eddy whether he had told you previously that Mr. Lopez's name was on that list he allegedly had.

MR. HAFFER: That's correct.

THE IMMIGRATION JUDGE: When you said "obtain a warrant," were you talking about a search warrant or a warrant of arrest?

MR. HAFFER: Both. I think in this situation a search warrant would have been sufficient to allow the officers to enter onto the premises and question the people thereon. And if prior to that they did have specific information about specific individuals, also an arrest warrant would be proper. It's also our contention from this morning's testimony, Your Honor, that the officers not only had time prior to this incident to obtain a warrant, but they also had time subsequent to talking with the respondent to have effected an arrest without violating the rights of Mr. Bradley and Mr. Lopez.

THE IMMIGRATION JUDGE: Say that again. I didn't

MR. HAFFER: Our contention is also that subsequent to the first contact the officers had with Mr. Lopez, they still could have effected an arrest in this case without violation of the respondent's and Mr. Bradley's constitutional rights by having waited outside until noon, or outside until the workers went home, in which case there would have been no problem about the question of entry and search, illegal search and seizure.

THE IMMIGRATION JUDGE: Since declaring the luncheon recess, I have, as I told you when you returned to the courtroom this afternoon, given this matter a great deal of thought. I think you will agree it is a puzzling situation. The whole question of applicability of the laws against unlawful search and seizure and unlawful arrest to immigration proceedings is very troublesome, to say the least. I know, because I have discussed this with you that you will agree there is no precedent decision covering the exact situation that you claim happened in this case. I have decided after considerable thought not to hear any further evidence on the issue of unlawful search. But I will permit you to make an offer of proof on that issue with regard to the evidence you had intended to present this afternoon. So you may now do so.

MR. HAFFER: If I may, Your Honor, just prior to commencing that, I would like to refer you to one series of decisions, perhaps relevant to this case. And I don't have the citations with me now, but I'd be glad to supply them to you. This deals with the applicability of Fourth Amendment and Fifth Amendment protection to noncriminal proceedings and, specifically, they deal with the confinement of mentally retarded or insane people, and recently, also juveniles. In recent cases there has been expansion of the right of the Fourth and Fifth Amendments to cover those noncriminal penalties which would seem to be somewhat analogous to the situation here. Although I do agree there has been no case which has held — been directly on point with this case. I will furnish you with those citations as soon as possible. I have them in my office. The first thing I'd like to do, Your Honor, as an offer of proof relates to the two photographs which have been labeled — marked as

Exhibit "A" for Identification and Exhibit "B" for Identification for the respondent. Mr. Bradley, the owner of Transco, will — would have testified that these photographs were taken by a professional photographer named Jorge Gonzalez on July 7, 1976, and that they are two views taken from approximately the same position, one looking forward and one looking toward the rear of the shop, and this is, in fact, how the shop appears — appeared at the time of the entry of the immigration officers on August 3, 1976. We, therefore, would like them to be entered in evidence at this time. Furthermore, Mr. Bradley was to have testified and was to have confirmed most of the information that was received this morning from Investigators Eddy and Elder. There are a few things, however, that would have been in contradiction with what was offered this morning in evidence. Specifically, Mr. Bradley would have testified he had indicated to the immigration officers to wait for him by signaling them to wait at the front door, that he was in the process of doing some work and would be with them in a few minutes and that they entered afterwards without waiting for him to come and greet them.

THE IMMIGRATION JUDGE: Was that when they were in the doorway or after they had passed through the door?

MR. HAFFER: When they were waiting inside the door.

THE IMMIGRATION JUDGE: They had already come through the door, then?

MR. HAFFER: Yes.

THE IMMIGRATION JUDGE: In other words, his gesture was one of "wait for me"?

MR. HAFFER: That's correct.

THE IMMIGRATION JUDGE: Go ahead.

MR. HAFFER: He would also have testified that Investigator Eddy came to him first and asked him to take and question one of his men and mentioned Adan Lopez Mendoza by name prior to having talked with the respondent. At this time was when Mr. Eddy indicated there was some discussion as to the right of the officers to be on the private property and Mr. Bradley indicated at this time he wanted

some form of court order or warrant for them to remain on his property and talk with his employees. He indicated they could come back after work and talk to the employees, but not during the workday. He asked for a warrant. He was told a warrant was not needed and that the immigration officers could come onto his property without any probable cause and talk to anybody they wanted to. Furthermore, he also indicated that he instructed one of his employees, who also would have been a witness today, to call the San Mateo County Police and that — or the San Mateo City Police, excuse me — and that Investigator Eddy had asked them not to call the police and said, "No, don't call the police" to a man named Nelson Melendez, who is also here today and would have been one of our witnesses. He would further testify he only asked him about one suspected illegal alien, Adan, although there was some indication perhaps they were looking for more, but only one name.

THE IMMIGRATION JUDGE: He is denying that he showed him a list?

MR. HAFFER: He's denying they showed him a list or any other names, that they had asked specifically for his name. In fact, he also would allege that from his conversation they went first to Adan because on his shirt was his name, Adan, and they recognized that name and they went to him first, and as it turned out, was the only person that they took away. We also will have information the officers questioned more than just one man. After talking to Adan they also questioned a Nelson Melendez, again, who, as it turns out, is a permanent resident of the United States. So there was more than one person questioned by the immigration officers, and I think the thrust this morning was that there was only one person questioned because they didn't want to get involved with anybody else because they didn't want —

THE IMMIGRATION JUDGE: They didn't want to cause a problem with Mr. Bradley.

MR. HAFFER: He also would have testified that the public generally did not enter his establishment, that, in general, he goes to places and picks up transmissions to repair and no more than once a week on the average do cus-

tomers walk into his office. It's not a general place of public business. The business of Transco is a wholesale business. I think for most other purposes, Your Honor, the testimony of Mr. Bradley and that of Mr. Eddy would coincide, with those differences. The other person that would have testified this afternoon would have been Nelson Melendez.

THE IMMIGRATION JUDGE: Before you get to that, would Mr. Bradley have testified that Adan Lopez-Mendoza's full name was on his coveralls?

MR. HAFFER: No. Just the name Adan, on his shirt, actually. It's a blue shirt with red writing that you often see in garages and transmission companies.

THE IMMIGRATION JUDGE: Go ahead.

MR. HAFFER: The other witness we would have had today is Nelson Melendez, who is an employee also of Transco and is a permanent resident of the United States. Again, he would have corroborated the testimony of both Mr. Eddy and Mr. Bradley as they coincided. Also, that they asked him for his name and whether he was a resident or citizen of the United States. And also, he was the man whom Mr. Bradley asked to call the police and who the investigator stated or asked not to call the police. Investigator Eddy had asked him or told him not to call the police.

THE IMMIGRATION JUDGE: Why do you make such a point of that calling the police?

MR. HAFFER: It's basically a question of the attitudes of the people. Your Honor. I think one of the reasons we consider this to be such a problem is that when there was indication that Mr. Bradley, the owner of the company, and others wanted to call the police was because they feared something illegal was going on or they wanted to have this matter taken up with the local police. According to their testimony, the immigration officers said, no, don't call the police, which further exacerbated a sense of uneasiness caused by the immigration officers' entry into his private property without his permission. I don't consider it to be a major point, but I do consider it to be a significant point. That's all the evidence I submit today, Your Honor.

THE IMMIGRATION JUDGE: You didn't give me the photographs. Respondent's Exhibit "A" for Identification is entered in evidence as *EXHIBIT "A"*. Respondent's Ex-

hibit "B" for Identification is entered in evidence as *EXHIBIT "B"*.

Mr. Haffer, your motion to terminate the proceeding on the ground that I lack jurisdiction to hear the matter is denied.

The Order to Show Cause and Notice of Hearing is entered in the hearing record as *EXHIBIT 1*.

MR. HAFFER: Your Honor, may I request at this time two things? First of all, may I have a written opinion for your decision to deny the motion?

THE IMMIGRATION JUDGE: When I give a decision on the whole case I will include an explanation.

MR. HAFFER: Then we would like at this time to ask for a continuance of the matter before we get into the case on the merits.

THE IMMIGRATION JUDGE: Why do you need a continuance?

MR. HAFFER: For several reasons. First of all, to be perfectly honest, we expected the entire day to be taken up with the issue on unlawful arrest, alleged unlawful arrest and alleged unlawful entry, and we are not prepared to go forward with the hearing on the merits. In addition, Your Honor, I think it's extremely important because of some of the decisions which you indicated to me during the recess, the decisions which I have stated, that although an arrest may be illegal, unlawful, the subsequent deportation may be lawful. I think once the Order to Show Cause has been admitted and once the Government presents its case, establishes a prima facie case for deportation, any possible issues to be raised in Federal court on the question of unlawful arrest become moot, and I think we should be given a chance at this time to have an adjournment of the hearing to pursue the matter in the United States District Court.

THE IMMIGRATION JUDGE: I don't understand you. What do you want to do in the United States District Court?

MR. HAFFER: We want to do several things. First of all, raise the issue of whether or not at this time the Immigration Service can continue with deportation proceedings. We want to seek a declaratory judgment on the issue of

whether or not the arrest was unlawful and the entry onto Mr. Bradley's property was unlawful. We want to, probably in connection with that, seek a temporary restraining order to restrain further deportation proceedings until a decision is reached by the United States District Court. Those are among the plans we have in the District Court. I think the real issue is this, and I think it is an important one, and we ask for a continuance at this time. I think it is very likely that the United States District Court would consider this case moot if the hearing on the merits takes place and the respondent is found deportable. I think the time to question the legality of the arrest and the legality of the entry is prior to the hearing on the merits. I think we should be given an opportunity to proceed with this matter in the District Court.

THE IMMIGRATION JUDGE: Do you wish to be heard, Mr. Leadbetter?

MR. LEADBETTER: Yes, Your Honor. From the evidence adduced this morning that it seems prominently clear the officers were well within their authority to engage in the activity that they did. Congress specifically invested the Immigration and Naturalization Service with the statutory powers enabling the interrogation of suspected aliens, the right to interrogate as to possible violations of immigration laws and statutory authority grants the immigration officers the right to seek to interrogate individuals reasonably believed to be of alien origin. And the underlying rationale is that the minimal invasion of privacy of the individual approached for questioning is justified by the special needs of the immigration officials to make such interrogations. This allowance for mere questioning which assumes the individual's cooperation is analogous to decisions which have (unintelligible) of authority for police officers. Lau, case 144, U.S. Court of Appeals, District Court 147, and also in accordance Chun Kim Wong Came case vs. Immigration Service, 468 F.2d, 1122. Now —

THE IMMIGRATION JUDGE: You are reading from a memo you have in front of you.

MR. LEADBETTER: That's correct, Your Honor.

MR. HAFFER: Why don't you just submit that.

MR. LEADBETTER: It is in rough form, but I will, Your Honor, because this does — this does indicate that the minimal imposition is more than offset because notwithstanding, and the court has said in the R.E. Lau case that the — we believe the statutory interrogation authority comprehends such minimum detention in this case because there are far greater intrusions upon personal privacy and nonforceable approaches since aliens in this country are sheltered by the Fourth Amendment in common with citizens. And the minimal invasion falling short of a full-blown arrest is such that the practical considerations ought to be considered that the number of individuals seeking to enter this country illegally is quite high and the number of those who succeed in this venture is rapidly increased with each passing year and the ability to gather proof against these illegal entrants depend upon a reasonable opportunity for interrogation is seemingly difficult. So what we have here is that officers are on a lead seeking to make a minimal intrusion on a person's rights as to their origin and lawfulness to remain in the United States and it wasn't until after such time that they determined he was an illegal alien that they sought to arrest him and only because he had no ties and was likely to abscond. Now, Mr. Haffer has had more than sufficient time should he wish to have got this matter to a head in the United States District court prior to waiting here for the immigration hearing. Now, the Service has not pressed, to date, for any no-work rider on his bond. But should Mr. Haffer, counsel for the respondent, seek any redress in the United States District Court and, ostensibly, on appeal to the U.S. Court of Appeals, and from his statements, ostensibly even higher, then we're faced with a situation of an illegal alien remaining, living, working and remaining in the United States during all this time and I think we've got to take into consideration it would be the better part of a year or eighteen months before this would be even — arguments would be heard. And there's just no real justification or basis not to proceed with the Order to Show Cause, Your Honor. Now, he has auxiliary rights, then, ostensibly this could be reversed. But it's still not going to change the basic fact we're faced with an alien who's

illegally in the United States and does not have any valid basis to remain in the United States, no immigrant visa, and he doesn't even have an entry as a visitor.

MR. HAFFER: May I respond?

THE IMMIGRATION JUDGE: Go ahead.

MR. HAFFER: I find this somewhat difficult because it appeared the original part of Mr. Leadbetter's response was to the question of the unlawful arrest or unlawful entry. Then he changed to the issue of whether or not we should proceed at this time.

THE IMMIGRATION JUDGE: All I really asked for him to respond to was your request for a continuance.

MR. HAFFER: I understand, but I would like to respond, if I could, to some of the statements he made as to the validity of the argument that the arrest was illegal or legal and the entry was illegal or legal. I don't believe in the judge's decision denying our motion for terminating the proceeding — if there's any decision necessarily made as to the legality or illegality of the arrest, I think the information which you have been reading from in that memo in front of you, which deals with the issues such as a minimal intrusion and the difficulty to get proof in some other way, the rather large significant problem the country has now with undocumented immigrants, certainly would not apply to a case like this. It may well apply to a stop on the street. It may well apply to stops or the functional equivalents at borders, but to say that the minimal intrusion when the Immigration Service comes onto somebody's private property during working hours without the permission of the owner or the supervisor, a foreman or anybody, to call that a minimal intrusion seems to me to be flying totally in the face of the Constitution. It would be a similar minimal intrusion for the police to do the same sort of thing in a criminal case. And I think to try to gloss over the actions of the immigration officers in this case by calling it a minimal intrusion on people's rights is an unjustifiable statement on your part. As far as bringing the matter to the United States District Court prior to coming here, I felt that it was important and I think the District Court would have felt the same way, that it was required that this issue be raised at the adminis-

trative level prior to raising it at the District Court level, which is why we did so. We felt that we had to exhaust our administrative remedies on the issue of the illegal arrest and the illegal entry and we have done that today. And I think that at this point we have a valid claim to attempt to raise this issue now before the United States District Court prior to proceeding on the merits.

MR. LEADBETTER: Your Honor, during the recess, Mr. Elder contacted the Zoning Commission, City of San Mateo, and business premises are zoned commercial, "C," rather than "M," manufacturing, and the commercial zone will be no different than a garage or a gas station. And I think if the Court would take notice of — not of its own knowledge, but from factual knowledge, that in a garage or a filling station one of the basis of doing business is inviting the public at large into the premises for services. And this commercial venture here is no different because it picks up transmissions and repairs them. It has a large open door which apparently allows deliveries of these goods or transmissions and/or the pickup. So there'd be no difference as far as open to the public.

THE IMMIGRATION JUDGE: I don't know why you're making this now, but as long as you've made it, you mean that anybody could have come off the street and walked into and had free run of Mr. Bradley's premises?

MR. LEADBETTER: I'm not sure there'd be free run, Your Honor, because in this particular case I think entering the premises for business or commercial purposes, or in this case entering to see the owner of the business to solicit his cooperation regarding potential law violations —

MR. HAFFER: If they refused this cooperation, then what?

MR. LEADBETTER: The refusal was not as to the officers, per se, but only during that particular time during working — as he said that it's all right to come on during lunch period, but not then. Of course, this took place after they determined that the respondent was an illegal alien.

MR. HAFFER: Your Honor, I think that it is not proper to take judicial notice that anything which is zoned "C" commercial means that every part of every commercial establishment zoned "C" is public. I don't think that the place

in a gas station where the safe is located, nor do I consider the place in a department store where stocks are supplied to be considered public.

THE IMMIGRATION JUDGE: Let's cut this argument short. First of all, Mr. Leadbetter, it is obvious I didn't state my reasons for my statement that I would not hear any further evidence on the issue but would hear an offer of proof, and from my denial of Mr. Haffer's motion. But I'll tell you now that my denial of Mr. Haffer's motion was not because I considered what the officers did lawful. By the same token, it wasn't because I considered it unlawful. I denied the motion because I considered what they did irrelevant. This is a civil proceeding. It has been so held by the United States Supreme Court and the Board of Immigration Appeals and several courts have also held that even if an arrest were improper, it does not affect the issue of deportability, of the propriety of deportation proceedings, which are considered civil in nature. And for that reason I decided that the manner in which the respondent was apprehended had no bearing on this proceeding. So I do not intend to make a finding on the legality or illegality of the search, alleged search and of the arrest. Now, the motion for continuance is denied.

Mr. Haffer, do you wish to plead to the contents of the Order to Show Cause for the respondent?

MR. HAFFER: Yes, Your Honor.

THE IMMIGRATION JUDGE: Will you waive the requirement I read and explain the contents to him at this hearing?

MR. HAFFER: I do.

THE IMMIGRATION JUDGE: How does he plead to the four allegations?

MR. HAFFER: He denies all of the allegations contained therein.

THE IMMIGRATION JUDGE: And he denies deportability?

MR. HAFFER: That is correct. I have also instructed my client, Your Honor, to refuse to answer any questions as relates to the Order to Show Cause on the basis of the Fifth Amendment.

MR. LEADBETTER: Your Honor, at this time the Government moves for a short recess.

THE IMMIGRATION JUDGE: Five minutes.

MR. LEADBETTER: Thank you, Your Honor.

THE IMMIGRATION JUDGE: The hearing is resumed. Are you ready to proceed, Mr. Leadbetter?

MR. LEADBETTER: I am, Your Honor.

THE IMMIGRATION JUDGE: Please do so.

MR. LEADBETTER: At this time the Government would like to recall to the witness stand Investigator Eddy. Let the record show that Mr. Eddy is in the courtroom.

THE IMMIGRATION JUDGE: Yes, and he is on the witness stand.

Proceed.

BY MR. LEADBETTER:

Q Mr. Eddy, I show you an I-213, Record of Deportable Alien, and a signature. Is that your signature, sir?

A Yes, it is.

Q Is that an official document made in your official capacity as an investigator?

A Yes, it is.

Q Does it pertain to the respondent, one Adan Lopez-Mendoza?

A Yes, it does.

MR. LEADBETTER: The Government will offer this into the record. It has been shown to counsel for the respondent.

THE IMMIGRATION JUDGE: Is there any objection, Mr. Haffer?

MR. HAFFER: I have no objection, Your Honor.

THE IMMIGRATION JUDGE: The I-213 is entered in evidence as *EXHIBIT 2*.

Proceed.

MR. LEADBETTER: Thank you, Your Honor.

BY MR. LEADBETTER:

Q Mr. Eddy, I show you an affidavit, Form 215B, two pages, Record of Sworn Statement, with a signature on the second page. Is that your signature, sir?

A Yes, it is.

Q Did you take this affidavit in conjunction with your official duties regarding the respondent on August 3, 1976?

A Yes, I did.

MR. LEADBETTER: The Government, Your Honor, introduces it into the record. Copy has been shown to counsel for the respondent.

THE IMMIGRATION JUDGE: Is there any objection, Mr. Haffer?

MR. HAFFER: Let me just find out something. Are you going to submit anything else?

MR. LEADBETTER: At this time, that's all. No. I'm going to submit one other thing.

MR. HAFFER: I have no objection to the admission of the I-215.

THE IMMIGRATION JUDGE: It is entered in evidence as *EXHIBIT 3*.

Do you have anything else, Mr. Leadbetter?

MR. LEADBETTER: Yes. I have one other document, Your Honor.

BY MR. LEADBETTER:

Q Mr. Eddy, I show you a Form G-123 Worksheet for Oral Report. Have you ever seen this report?

A Yes, I have.

Q Is that the worksheet that was the basis of your going to San Mateo to check the authenticity of this information as to alleged illegal aliens being on the premises?

A Yes, it is.

MR. HAFFER: Mr. Leadbetter, could I possibly have a copy of that before I leave today? Is that possible? If it is being submitted into evidence, I think it would be appropriate.

MR. LEADBETTER: I don't see any reason why not.

At this time, Your Honor, the Government wishes to introduce that into the record.

THE IMMIGRATION JUDGE: Is there any objection to this, Mr. Haffer?

MR. HAFFER: No objection whatsoever. I'd like to be able to make a copy of that before we leave today.

THE IMMIGRATION JUDGE: Why are you offering this Worksheet for Oral Report, Mr. Leadbetter?

MR. LEADBETTER: Just for the sake of the record, Your Honor.

THE IMMIGRATION JUDGE: What do you mean? What does that mean, "for the sake of the record"?

MR. LEADBETTER: The — undoubtedly, Your Honor, there'd be an appeal and in — it'd be for the sake of the whole record.

THE IMMIGRATION JUDGE: How does this help the record?

MR. LEADBETTER: It does indicate —

THE IMMIGRATION JUDGE: It seems to me, if you're going to offer it, you should have offered it this morning when Mr. Eddy was testifying, because this doesn't go to the issue of deportability.

MR. LEADBETTER: No, it doesn't.

THE IMMIGRATION JUDGE: That's all I am taking evidence on.

MR. LEADBETTER: The Government at this time withdraws it.

MR. HAFFER: Your Honor, I would request we have it in evidence at this time. This is the G-123, is it not, that Mr. Eddy mentioned before? And I asked for it at the time, as a matter of fact.

THE IMMIGRATION JUDGE: I will enter it in evidence as *EXHIBIT C*.

MR. HAFFER: For the respondent?

THE IMMIGRATION JUDGE: Just Exhibit C. I have entered the two photographs as Exhibits A and B, and this is Exhibit C. The reason I've used letters for those is that those refer to the issue of the search.

MR. HAFFER: All right, as does this.

THE IMMIGRATION JUDGE: And I have used numbers for exhibits relating to the issue of deportability.

Do you have anything else on the issue of deportability, Mr. Leadbetter?

MR. LEADBETTER: No, Your Honor.

THE IMMIGRATION JUDGE: Do you want to question Mr. Eddy?

MR. HAFFER: I have no questions.

THE IMMIGRATION JUDGE:

Q Mr. Eddy, just a few things. This Form I-213, which you identified and which I have entered in evidence as Ex-

hibit 2, contains a lot of information. Where did you get the information recorded on it?

A Through direct interview with Mr. Lopez.

Q Did you type this yourself?

A Yes, I did.

Q Is that your signature on the bottom?

A Yes, it is.

Q Where did the interview take place?

A Well, I anticipated some problems with this case, so part of the interview took place in the vehicle outside Transco Transmission down in San Mateo. The rest of the interview took place in Room 1132, 630 Sansome Street.

Q In your office?

A Right.

Q Where did you prepare the document?

A The document was prepared here.

Q Just to repeat, is all the information in the document about the respondent's alienage and manner of entry information that was furnished to you by him?

A That is correct. At the time I initially interviewed him, I wrote down the answers to several questions on the back of the G-123. I can't recall whether or not I changed that information after we returned to the Service office. But it's basically —

THE IMMIGRATION JUDGE: Are there any other questions of Mr. Eddy, Mr. Haffer?

MR. HAFFER: No, Your Honor.

THE IMMIGRATION JUDGE: Mr. Leadbetter?

MR. LEADBETTER: No, Your Honor.

THE IMMIGRATION JUDGE: You are excused, Mr. Eddy.

Mr. Haffer, does the respondent wish to offer any evidence on the issue of deportability?

MR. HAFFER: No, Your Honor, we don't. As I indicated previously, I have consulted with Mr. Lopez and he is not to respond to any questions on the issue of his deportability on the basis of the Fifth Amendment. However, if he should be found deportable, we would, obviously, like to request voluntary departure in lieu of deportation.

THE IMMIGRATION JUDGE: We'll get to that. Of course, you have made a statement that you have instructed him to refuse to testify on the basis of the Fifth Amendment. He hasn't been asked to testify.

MR. HAFFER: Pardon me?

THE IMMIGRATION JUDGE: He hasn't been asked to testify.

MR. HAFFER: No, he hasn't.

MR. LEADBETTER: Your Honor, the Government would, if it's other than the fact apparently it's going to be a nullity if Mr. Haffer won't allow him to testify, the Government would call him.

THE IMMIGRATION JUDGE: The Fifth Amendment is a personal privilege, Mr. Leadbetter.

MR. LEADBETTER: All right. The Government would call him, Your honor.

THE IMMIGRATION JUDGE: Mr. Lopez, come up on the witness stand.

Q Remain standing and raise your right hand to be sworn.

MR. HAFFER: He's already been sworn.

THE IMMIGRATION JUDGE: Proceed, Mr. Leadbetter.

BY MR. LEADBETTER:

Q Would you state your complete and full name, sir.

MR. HAFFER: Your Honor, he's refusing to answer, I believe.

THE IMMIGRATION JUDGE: He is just sitting silently. You may instruct him if you wish, Mr. Haffer.

MR. HAFFER: Will it be translated what I instruct him?

THE IMMIGRATION JUDGE: Yes. Make a statement for the record and the interpreter will translate it.

MR. HAFFER: I advise my client not to answer the question on the basis that it would be incriminatory.

THE IMMIGRATION JUDGE (to interpreter): Translate that for him.

Q Mr. Lopez, your attorney has instructed you not to answer the question on the ground that it would tend to incriminate you. Do you wish to follow his instruction or do

you wish to answer the question? Do you wish to answer the question or will you accept his advice?

A I want to follow his instructions.

Q Then do you refuse to answer the question?

A Yes. I refuse to answer the question.

Q Will you refuse to answer any other questions that the trial attorney asks you for the same reason?

A Yes.

THE IMMIGRATION JUDGE: Obviously, there is no useful purpose in questioning him any further, Mr. Leadbetter.

MR. LEADBETTER: Yes, Your Honor.

THE IMMIGRATION JUDGE: Will you stipulate the country to which he wishes to be sent if he is to be deported, Mr. Haffer?

MR. HAFFER: Yes, Your Honor. Mexico.

THE IMMIGRATION JUDGE: Now, you said he wants to apply for voluntary departure.

MR. HAFFER: Yes, Your Honor. Although, we still will raise this issue on appeal. I think if he is found deportable, he doesn't have any previous immigration violation record, that I know of, or that the Service knows of, and he has not been receiving welfare, so I would request a period of thirty days voluntary departure.

THE IMMIGRATION JUDGE: Do you want to question him on the issue of voluntary departure, Mr. Haffer?

MR. HAFFER: Your Honor, I will ask him a few questions that deal directly with the issue of his eligibility for voluntary departure, if I may. If I may also, I'd like to have the translator inform the respondent that I am now advising him to answer the following questions that I'm going to pose to him on the issue of voluntary departure.

THE IMMIGRATION JUDGE (to interpreter): Miss Miranda, inform — Miss Miranda is the official interpreter in the Spanish language, of the Service. And the respondent will testify through her as he did prior, thus far. Instruct him that his attorney has said he should now answer the questions that he will ask him.

Go ahead, Mr. Haffer.

BY MR. HAFFER:

Q Mr. Lopez, have you previously been deported from the United States?

A No.

Q Have you ever been convicted of any crime?

A Never.

Q Have you ever received any public assistance or welfare benefits?

A Never.

Q Are you in possession of sufficient funds to pay for your trip, return trip to Mexico?

A Yes.

Q And if you were given a period of thirty days within which to depart the United States instead of being deported, would you then depart within those thirty days?

A Yes.

MR. HAFFER: I have no further questions.

THE IMMIGRATION JUDGE: Do you have any questions, Mr. Leadbetter?

MR. LEADBETTER: Yes.

BY MR. LEADBETTER:

Q How did you enter the United States in October —

MR. HAFFER: Your Honor, I would at this point again instruct my client to refuse to answer any questions that deal — that relate to the charge of deportability.

THE IMMIGRATION JUDGE: Mr. Haffer, in order to qualify for voluntary departure, the respondent has the burden of proof and he must answer questions freely. But any answer that he gives in connection with the application for voluntary departure may not be used against him on the issue of deportability.

MR. HAFFER: I honestly don't see, Your Honor, what the relevance is of how he entered the United States as to the question of voluntary departure.

THE IMMIGRATION JUDGE: It certainly has relevance.

MR. HAFFER: If he is found deportable under the charge contained in the Order to Show Cause, the deportation charge is "entered without inspection."

THE IMMIGRATION JUDGE: Why do you need that answer, Mr. Leadbetter.

MR. LEADBETTER: Your Honor, certainly the respondent should not be allowed in a civil proceeding to use the Fifth Amendment as a sword when it is intended as a shield. Anything relevant — this is a matter of discretion from the Attorney General through the immigration judge as to whether —

THE IMMIGRATION JUDGE: Don't you think the Service has established that he is deportable as an alien who entered without inspection?

MR. LEADBETTER: That's true, Your Honor, but these questions put forth could lead to avenues of other matters as to his fitness to be granted the privilege of voluntary departure. It is not something that is automatically granted. Because he can state that he has not been arrested and has sufficient funds to return to Mexico, it's more than that. It's a discretionary grant for the respondent.

THE IMMIGRATION JUDGE: Just a second. Mr. Haffer, are you still instructing him not to answer?

MR. HAFFER: I made an objection. Was my objection overruled to that question?

THE IMMIGRATION JUDGE: About its relevance?

MR. HAFFER: I mean the objection to the relevance.

THE IMMIGRATION JUDGE: The objection is overruled.

Q There is a question before you, Mr. Lopez. How did you enter the United States?

MR. HAFFER: Your Honor, based on your representations to us that the answers to questions as they relate to the issue of his eligibility for voluntary departure will not be used and cannot be used in the issue — binding on the issue of deportability, I will instruct my client to answer questions. However, I will retain the right to object to individual questions.

THE IMMIGRATION JUDGE: Of course, my statement — I've always felt that way, long before the regulation so provided. But 8 CFR 242.17 so provides.

MR. HAFFER: I would like to add we will not sit here idly and allow the question of voluntary departure to become a full-fledged deportation hearing, which is what I am afraid may happen.

THE IMMIGRATION JUDGE: You can object to any question you wish.

MR. HAFFER: Okay. (To interpreter) You may instruct Mr. Lopez to respond to any questions which I do not object to.

BY MR. LEADBETTER:

Q Your entry into the United States, sir, in October 1975, near San Ysidro, how did you enter the United States?

A Walking.

Q Did you come by yourself or did you use the services of a smuggler or a coyote?

MR. HAFFER: Your Honor, I object to that question. The information contained in the documents already submitted by the Government, a statement by him under oath, as well as statements by Mr. Eddy, is that no smuggling was involved. I don't see the relevance of raising this point at this time.

THE IMMIGRATION JUDGE: There is such a statement in the I-213. The objection is sustained.

BY MR. LEADBETTER:

Q How many times have you been in the United States prior to this occasion, sir?

A This is the first time.

Q What was your intention in coming to the United States?

A To give my wife a better living condition.

Q How do you mean, better living conditions?

A By sending her money so she can live better.

Q How much do you send her?

A It varies. Sometimes fifty, sixty, one hundred.

Q How many children do you have in Mexico, sir?

A One.

Q Have you ever been arrested in Mexico?

A Never.

Q Never in the United States?

A No.

Q When you entered the United States in October of 1975, did you go to work immediately?

A No.

Q When did you go to work?

A Approximately in November.

Q November of 1975?

A Yes.

Q Did you file federal income taxes or state income taxes for the year 1975?

A No.

Q Why not?

A Because it was too soon.

Q What do you mean, too soon?

A I did not know about it.

MR. HAFFER: Your Honor, I think we should ask one question here of whether it was possible he earned enough money to have him required to file income taxes.

THE IMMIGRATION JUDGE: He only claims to have been here at most three months.

MR. HAFFER: Actually, it was November he started working. So it was two — more or less at two dollars an hour, which is what it says.

MR. LEADBETTER: Nothing's been brought out, Your Honor. He says he didn't know about it. Rather than get into that, since he stated he didn't know about it, but, in fact, did not want to file either federal or state income tax, I think the Court should take into its notice that, in effect, by not filing if he earned sufficient income, and that's a violation of the law.

MR. HAFFER: How could you possibly raise that point? If he is not required to file, what difference does that make whether he filed it or not if he's not required to file.

THE IMMIGRATION JUDGE: Let's ask him this question.

Q During the year 1976, Mr. Lopez, have you worked steadily?

A Yes.

Q Has money been withheld from your wages for federal and state income tax purposes?

A Yes.

THE IMMIGRATION JUDGE: Does that satisfy you, Mr. Leadbetter?

MR. LEADBETTER: The issue is 1975. He doesn't have to file his federal income tax for 1976 until 19 —

THE IMMIGRATION JUDGE: Mr. Leadbetter, the man was here less than three months in 1975.

MR. LEADBETTER: Well, then, the burden is still on him to show he didn't earn sufficient income. The Government is charging that by his statement that he didn't know about the income tax, he didn't know it. So even if he did, it's —

THE IMMIGRATION JUDGE: What is your point?

MR. LEADBETTER: The point is, the fact he has not filed an income tax is a violation of federal law and is something to be considered by the Court as to whether he'd be granted voluntary departure or not.

THE IMMIGRATION JUDGE: Of course, whether he has complied with the Internal Revenue Code is important, but I must laugh to myself that you are asking this man this question. You have participated in hundreds of hearings involving voluntary departure issues and this is the first time you have ever asked that question. But you are just dragging this out unnecessarily.

Q Mr. Lopez, was your first employer the same employer for which you are now working?

A Yes.

Q Then, when did you go to work for him?

A It was around the 15th of the month, but I don't know exactly, but it was in November.

Q Was that your first job in the United States?

A Yes.

Q From that time on, did your employer withhold money from your wages for state and federal income taxes?

A Yes.

Q Do you happen to know how much you earned during the year 1975 in the United States?

A No. I do not know exactly.

Q At the end of the year, or before April 15th, 1976, did you consult anybody about whether you were entitled to a refund of the money that had been withheld from your wages for your 1975 earnings?

A No.

THE IMMIGRATION JUDGE: Are you satisfied, Mr. Leadbetter?

MR. LEADBETTER: No, Your Honor.

THE IMMIGRATION JUDGE: You are still not satisfied about the income tax?

MR. LEADBETTER: The issue, of course, is how many exemptions did he claim as far as that goes. If he claimed three or four exemptions, they wouldn't withhold anything.

MR. HAFFER: Excuse me, Your Honor. The question is very simply how much did he earn an hour for those six weeks that he worked in the United States in 1975.

THE IMMIGRATION JUDGE: Mr. Leadbetter, inasmuch as you are so concerned about income tax, do you know what he had to earn in order to be required to file a return?

MR. LEADBETTER: I believe it's \$750.

MR. HAFFER: Wrong. That's wrong.

MR. LEADBETTER: If he only had this one job, if this was the only place he worked, Your Honor.

THE IMMIGRATION JUDGE: I don't think that's right, Mr. Leadbetter.

MR. HAFFER: I think it's quite a bit more than that. I think it's \$1,250, \$1,500. Actually, he was being paid \$2.50 an hour at that time and for six weeks that's 240 hours, that comes to approximately \$700 income in 1975.

MR. LEADBETTER: We don't know that, Counsel. He could have held down more than one job.

MR. HAFFER: Why don't you just ask him. He said he worked for only one —

THE IMMIGRATION JUDGE: Come, Mr. Leadbetter. You are making a real mountain out of a real molehill.

MR. LEADBETTER: I don't believe so, Your Honor.

THE IMMIGRATION JUDGE: I am not going to allow anymore questions on that. Let's get on with this. I've heard enough of this case today anyhow.

MR. LEADBETTER:

Q Did you ever apply in Mexico, Mr. Lopez, to enter the United States?

A Never.

Q Did you ever apply for a — just a visitor's authorization, rather than an immigrant visa to come into the United States?

MR. HAFFER: That's been asked and answered, Your Honor. He already said he never applied for a visa.

THE IMMIGRATION JUDGE: I don't think anymore questions on the issue of voluntary departure are in order, unless you have something really bearing on the issue, Mr. Leadbetter. Do you have anything really pertinent?

MR. LEADBETTER:

A Are you working now, sir?

A Yes.

Q For the same employer?

A Yes.

Q Did you — strike that.

MR. LEADBETTER: Nothing further, Your Honor.

THE IMMIGRATION JUDGE: Do you have anything further on the issue of voluntary departure, Mr. Haffer?

MR. HAFFER: I think we've had enough.

MR. LEADBETTER: I'm going to object to that comment by counsel that, "I think we've had enough," Your Honor. I don't think that's called for at all.

THE IMMIGRATION JUDGE: I think we've had enough too.

MR. LEADBETTER: I object to it.

THE IMMIGRATION JUDGE: So you have objected.

Is there anything else you want to present, Mr. Haffer?

MR. HAFFER: No, Your Honor. Only, I think both by the answers to my questions and to Mr. Leadbetter's questions, he certainly — he is eligible and deserves the grant of voluntary departure in lieu of deportation.

MR. LEADBETTER: I think if the Court would check into the matter of *Pimentel*, that's 12 I. & N., page 50, there's a matter of similar circumstances. But even as far as factual situations, almost as benign in this particular case, it was denied, just as a matter of discretion because, in effect, the alien had nothing going for him. In this particular case, we're faced with an illegal alien here in the United States working in the United States with impunity in the United States, admitting that he had not filed or

even heard of United States federal tax laws or the state tax laws, now seeking the grant of the Court on something that is discretionary from the Attorney General.

THE IMMIGRATION JUDGE: It is too late for me to give a decision now.

So the hearing is closed and I reserve decision.

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I hereby certify that to the best of my ability and belief the foregoing pages numbered 1 through 102 are a complete and accurate transcript of the above hearing.

/s/ MARY L. MOYNIHAN

Mary L. Moynihan
Closed Microphone Reporter
February 7, 1977

[Exhibit 1]

In Deportation Proceedings under Section 242 of the Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A 22 452 208

In the Matter of Adan LOPEZ-Mendoza Respondent.
In Service Custody
San Francisco, California

Address (number, street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Mexico and a citizen of Mexico;
3. You entered the United States near San Ysidro, California on or about October 1975;
4. You were not then inspected by an immigration officer.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241 (a) (2) of the Immigration and Nationality Act, in that, you entered the United States without inspection.

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at Room 1032 - 630 Sansome Street - San Francisco, California 94111 on August 10, 1976 at 10:00 AM, and show cause why you should not be deported from the United States on the charge (s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

/s/ Charles E. Hoffman
Assistant District Director
for Investigation.
San Francisco, California 94111

Dated: August 3, 1976

CC: Douglas P. Haffer, Esq.
534 Pacific Avenue
San Francisco, Ca. 94133

NOTICE TO RESPONDENT

**ANY STATEMENT YOU MAKE MAY BE USED
AGAINST YOU IN DEPORTATION PROCEEDINGS**

**THE COPY OF THIS ORDER SERVED UPON YOU IS
EVIDENCE OF YOUR ALIEN REGISTRATION
WHILE YOU ARE UNDER DEPORTATION
PROCEEDINGS, THE LAW REQUIRES THAT IT BE
CARRIED WITH YOU AT ALL TIMES**

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witness considered, you should arrange to have such witnesses present at the hearing.

At your hearing you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charges set forth therein. You will have an opportunity to present evidence on your own behalf, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be:

- ☐ Detained in the custody of this Service.
- ☐ Released on recognizance.
- ☒ Released under bond in the amount of \$2,000.

You may request the Immigration Judge to redetermine this decision.

☐ I do ☐ do not request a redetermination by an Immigration Judge of the custody decision.

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

(signature of respondent)

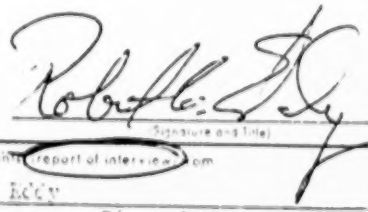
(date)

CERTIFICATE OF SERVICE

Served by me at San Francisco, Ca. on August 3, 1976 at 4:05 p.m.

/s/ R. C. Eddy

(signature and title of employee or officer)

| | | | |
|---|--|--|----------------------------------|
| United States Address (Residence) (Number) (Street) (City) (State) | | 67 115 Labor | |
| 784 4th Ave., San Bruno, CA | | None Visible | |
| Date, Place, Time, Manner of Last Entry | | Passenger Boarded At: | |
| 10/75, near SFO, CA | | None | |
| Number, Street, City, Province (State) and Country of Permanent Residence | | AR Form (Type & No.) | |
| Don Con Aguaje, unade A uilillo, Mich., Mexico | | <input type="checkbox"/> Single <input type="checkbox"/> Married <input type="checkbox"/> Separated <input type="checkbox"/> Divorced | |
| Birthdate | Date of Action | Location Code | |
| 4/18/51 | 8/2/76 | SFR | |
| City, Province (State) and Country of Birth | <input type="checkbox"/> Lifted <input type="checkbox"/> Not Lifted | | |
| Guadalupe, Aguililla, Mich., Mexico | <input type="checkbox"/> Lifted <input type="checkbox"/> Not Lifted | | |
| Visa Issued At | Social Security Account Name | | |
| | None | | |
| Date Visa Issued | Social Security No. | Send C.O. Rec. Check To | |
| | None | SFR | |
| Immigration Record | Criminal Record | | |
| Claims none | Claims none | | |
| Name, Address, and Nationality of Spouse (Maiden Name, if appropriate) | | Number & Nationality of Minor Children | |
| Guadalupe ICAVY, Line 5, Mexico | | 1 Mexico | |
| Father's Name, and Nationality, and Address, if Known | | Mother's Present and Maiden Names, Nationality, and Address, if Known | |
| Eladio ICAVY, Line 5, Mexico | | Guadalupe ICAVY, deceased, Mexico | |
| Monies Due/Property in U.S. Not in Immediate Possession | Fingerprints | Lookout Book Checked | Departation Charges (Code Words) |
| <input checked="" type="checkbox"/> None Claimed <input type="checkbox"/> See Form 1-43 | <input checked="" type="checkbox"/> Yes <input type="checkbox"/> No | I-120 | 1-120 |
| Name and Address of Host (Current U.S. Employer) | | From To | |
| Transco, 221 First Ave., San Mateo, CA 2.00/hr WFI | | 11/75 12/75 | |
| Narrative (Outline particulars under which alien located/apprehended. Include details, not shown above, re time, place, manner of last entry, and elements which establish administrative and/or criminal violation. Indicate means and route of travel to interior.) | | | |
| SUBJECT encountered at above place of employment on the basis of telephonic information from on GLEIA GUTIERREZ, 335 White Street, San Francisco, 874-7347. | | | |
| SUBJECT last entered the United States near San Ysidro, California during the last days of October 1975, without being inspected by an Immigration Officer. | | | |
| SUBJECT is being represented by DONALD LAWLER, Attorney at Law. | | | |
| SUBJECT admits alienage and deportability. He was not smuggled into the US, and he is not receiving welfare. | | | |
| (If space insufficient, show "continued" and continue on reverse, from bottom up) | | Signature and Title  Robert C. Remy | |
| DISTRIBUTION: | | Received (subject and document) report of interview from | |
| 1 File | | Officer: Robert C. Remy | |
| 1 Log | | 6/3/1976 at 2:30 PM | |
| | | Disposition: 300/133 | |
| | | (Receiving Officer): Remy | |

[Exhibit 3]
AFFIDAVIT

IN RE: LOPEZ-Mendoza, Adan

FILE NO. _____

EXECUTED AT 511 1st Ave., San Mateo, Ca

DATE _____

Before the following officer of the U.S. Immigration and Naturalization Service, Robert C. Eddy, in the Spanish language. Interpreter None used.

I, Adan LOPEZ-Mendoza, acknowledge that the above-named officer has identified himself to me as an officer of the United States Immigration and Naturalization Service, authorized by law to administer oaths and take testimony in connection with the enforcement of the Immigration and Nationality laws of the United States. He has informed me that he desires to take my sworn statement regarding my immigration status in the United States

He has told me that my statement must be freely and voluntarily given and has advised me of these rights:

"You have the right to remain silent.

Anything you say can be used against you in court, or in any immigration or administrative proceeding.

You have the right to talk to a lawyer for advice before we ask you any questions and to have him with you during questioning.

If you cannot afford a lawyer, one will be appointed for you before any questioning if you wish.

If you decide to answer questions now without a lawyer present, you will still have the right to stop answering at any time. You also have the right to stop answering at any time until you talk to a lawyer."

I am willing to make a statement without anyone else being present. I swear that I will tell the truth, the whole truth, and nothing but the truth, so help me, God.

Being duly sworn, I make the following statement:

My true and correct name is Adan Lopez-Mendoza; I have never used any other names. I was born at Guallabo, Mich., Mexico on April 18, 1951, and I am still a citizen of Mexico. I last entered the United States in the last days of October 1975, near Tijuana, B.C., Mexico, without being inspected by an Immigration Officer.

Eladio LOPEZ is my father; he is a citizen of Mexico, and he has never lived in the United States. My mother was Guadalupe MENDOZA, she is now dead, but she was a citizen of Mexico.

I have read (or have had read to me) the foregoing statement, consisting of 2 pages. I state that the answers made therein by me are true and correct to the best of my knowledge and belief and that this statement is a full, true, and correct record of my interrogation on the date indicated by the above-named officer of the Immigration and Naturalization Service. I have initialed each page of this statement (and the correction(s) noted on page(s) 1).

Signature: /s/ Adan Lopez M

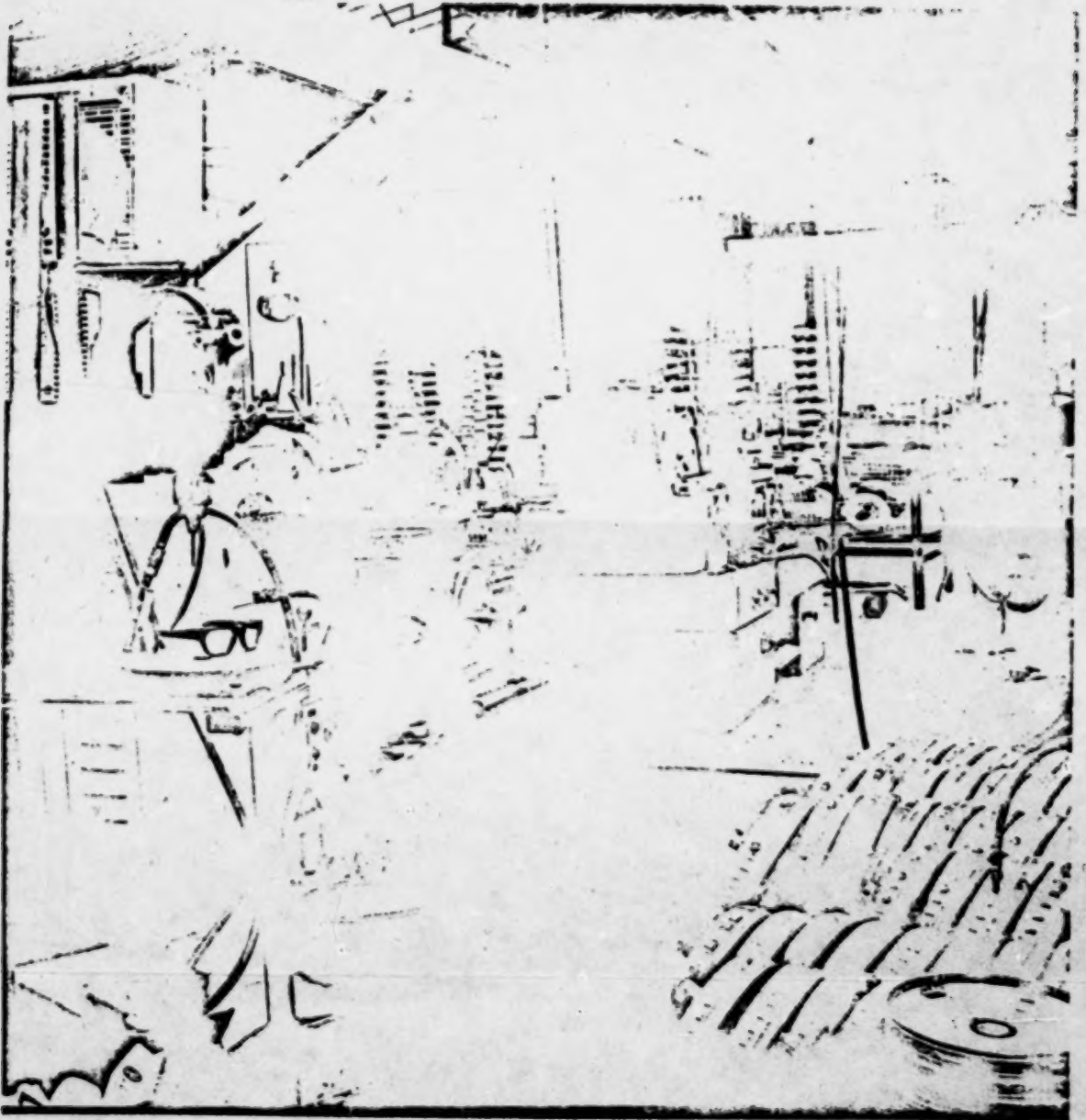
Subscribed and sworn to before me at San Francisco on August 3, 1976

/s/ R. C. Eddy
Officer, United States
Immigration and Naturalization Service

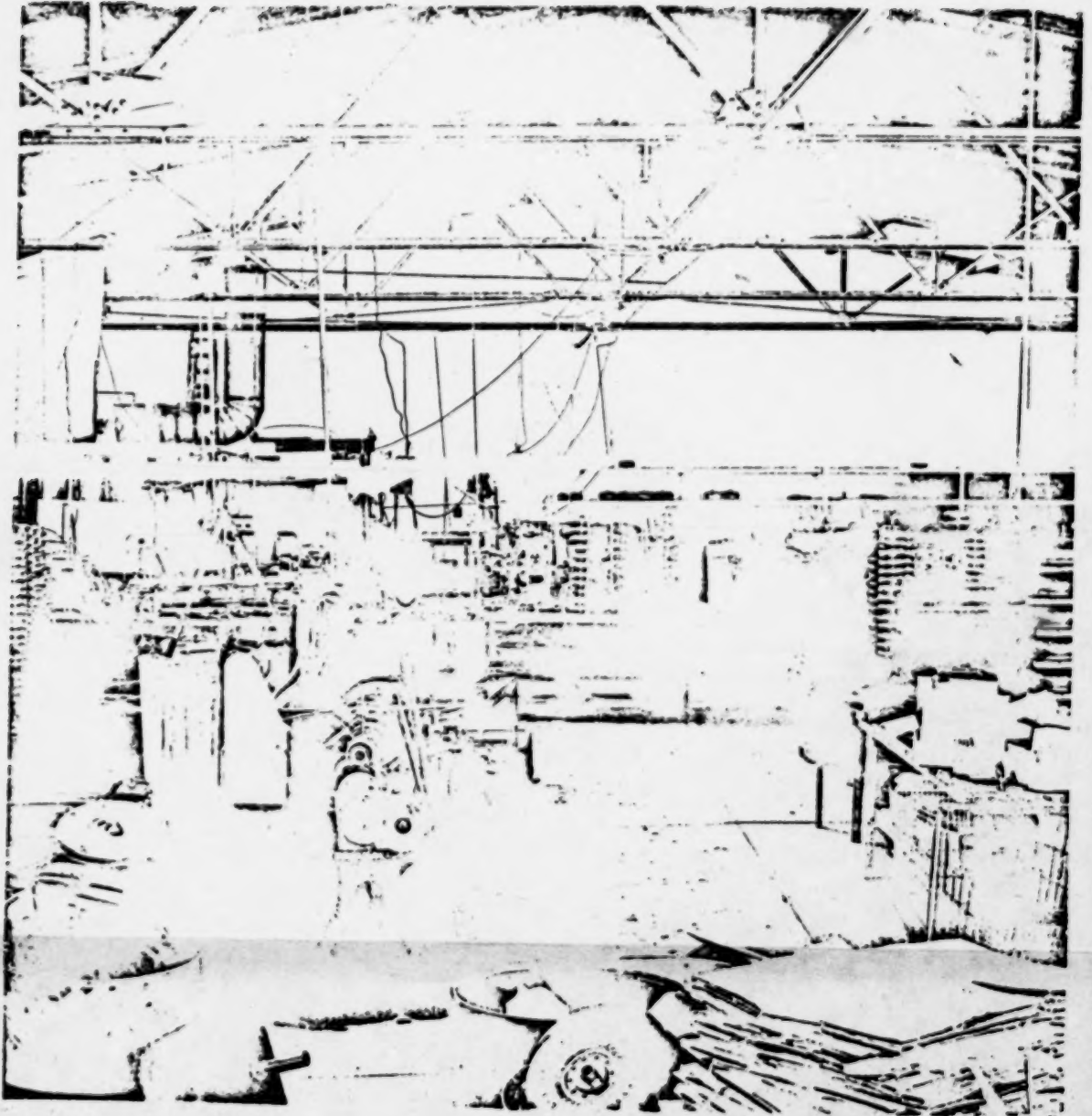
Witnessed by: /s/ R.C.Smart, IMV

RECORD OF SWORN STATEMENT

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
Form I-263A (Rev. 11-20-63)



10-8-76 *AK* A 33



13 139
10-8-76

WORK SHEET FOR ORAL REPORT

(11)

3/5/77
B-7

TE: July 6, 76

EMPLOYEE: J. J. J. J. J.

NAME: Guadalupe Aguilar, Jose Aguilar ALIASES: ~~STEFANOS~~
 PRESENT ADDRESS: 41 Oakwood St. SFR (Garage) Spu
 EMPLOYMENT AND ADDRESS: 511 South 1st San Mateo Ca.
 AGE OR BIRTH DATE: 24-30 NATIONALITY: Mexicans

DESCRIPTION: _____
 (Height) (Weight) (Build) (Other - Glasses, Mustache, Scars, etc.)

ENTRY DATA: Date: _____ Place: _____ Manner: illegal

ADDITIONAL INFORMATION: 7 Illegals Residing Together.

- 1.) Jose Luis Mora
- 2.) Eladio Mora
- 3.) Baltiazar Chavez - Making False green cards
- 4.) Baltiazar Mora
- 5.) Ramon Lopez

Selling Green cards For \$50.00

SOURCE: Gloria Gutierrez 333 Elsie St. SFR 824-7327
 (Address) (Tel. No.)

ASSIGNED TO: _____

Index _____

DATE: _____

ALPHA _____

I-53 _____

BY: _____

Date: _____ Searcher _____

Form G-123
 (Rev. 11-5-64)

8/02/76 No Such Address in
 San Mateo

APR 16-17
 admitted

10-8-76 140
 me

MURKIN - 11/11/76, 11:11
 Morris

8/02/76 9 A.M

Interviewed Art

"Bradley" owner of

Drammer, 511 E. 1st Ave.

He threatened Investigator
 Robert Eddy with
 these words "The
 next time you come
 here you are going
 to lose your ass"

United States of America

DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

May 9

19 80

CERTIFICATION

BY VIRTUE OF the authority vested in me by Title 8, Code of Federal Regulations, Part 103
a regulation issued by the Attorney General pursuant to Section 103 of the Immigration and
Nationality Act, of 1952, as amended.

I HEREBY CERTIFY that the annexed documents are originals, or copies thereof, from the
records of the said Immigration and Naturalization Service, Department of Justice, relating to

ELIAS SANDOVAL SANCHEZ

No. A22 346 925, of which the Attorney General
is the legal custodian by virtue of Section 103 of the Immigration and Nationality Act.


James B. Turnage, Jr.
JAMES B. TURNAGE, JR.
District Director

Immigration and Naturalization Service

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ELIAS SANDOVAL SANCHEZ
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A22 346 925

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UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

ELIAS SANDOVAL SANCHEZ, (A22 346 925)
PETITIONER

vs.

IMMIGRATION & NATURALIZATION SERVICE
RESPONDENT

NO. 80-7189

PETITION FOR REVIEW

Petitioner ELIAS SANDOVAL hereby petitions for review of the decision of the Immigration Judge dated October 7, 1977, and of the decision and order of the Board of Immigration Appeals, United States Department of Justice, dated Feburary 21, 1980, dismissing petitioner's appeal to the said Board from order of deportation.

/s/ Charles H. Barr

CHARLES H. BARR
Attorney for Petitioner
1207 Geo. Wash. Way
Richland, WA 99352
(509) 943-4661

CERTIFICATE OF SERVICE

I, Charles H. Barr, attorney for Petition[er], hereby certify, that a copy of the foregoing petition was mailed postage prepaid to those shown on the attached list, this 10th day of April, 1980.

/s/ Charles H. Barr

CHARLES H. BARR

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

MEMORANDUM

A22 346 925

Date: April 7, 1980

To : Chairman
Board of Immigration Appeals
5203 Leesburg Pike, Suite 1609
Falls Church, VA 22041

FROM : James B. Turnage, Jr., District Director
Seattle, Washington

SUBJECT : Elias, SANDOVAL-Sanches, A22 346 95
Motion To Re-open

The Respondent's appeal to the Board was dismissed on February 2, 1980, and he was given 30 days voluntary departure by the Board, until March 21, 1980.

The Respondent's Motion to Reopen, dated March 10, 1980, was received by the Service on March 24, 1980. The Service is opposing the motion because it restates the issues raised on appeal, does not comply with 8 CFR 3.2, and appears to be a delaying tactic, as set forth in our form G-29 memorandum dated April 3, 1980.

Therefore, the Service does not intend to stay deportation during the pendency of this motion, and will proceed with deportation notwithstanding the motion. A warrant of deportation will be prepared within the next few days, and the Respondent will subsequently be served with a surrender demand (Form G-166).

/s/ James B. Turnage, Jr.

UNITED STATES GOVERNMENT

MEMORANDUM

A22 346 925

Date: April 3, 1980

To : Immigration Judge

FROM : Trial Attorney

SUBJECT : Elias SANDOVAL-Sanches, A22 346 95
SERVICE OPPOSITION TO MOTION
TO RE-OPEN

☐ The Service does not desire to appeal the decision of the LJ.

☐ The Service ☐ does ☐ does not desire to file a brief in opposition to the appeal.

☒ The Service ☒ does ☐ does not oppose the motion for reconsideration or reopening.

☐ The Service ☐ does ☐ does not oppose the alien's application for discretionary relief.

☐ The Service requests an extension of _____ days to prepare its brief.

☐ Granted ☐ Denied

Date

LJ

☒ 1. Counsel is mistaken regarding jurisdiction. The Board now has the jurisdiction to re-open, if justified.

2. Counsel is raising the same points in his motion to re-open that he raised in his appeal to the Board on 10-19-77. The Board dismissed the appeal on 2-21-80. The motion therefore does not comply with 8 CFR 3.2

3. It appears that Counsel is seeking further delay in this matter which has already been pending since 6-24-77. It is urged that the motion be denied.

cc: Charles H. Barr, Esq.
1207 Geo. Washington Way
P.O. Box 2733
Tri-Cities, WA 99302

CERTIFICATE OF SERVICE. The undersigned certifies that he mailed a copy of this memorandum to Respondent or his attorney of record on APR 4, 1980.

FORM -G29

/s/ Kendall Warren
Trial Attorney

CHARLES H. BARR
Attorney at Law
1207 Geo. Wash. Way (Richland)
Wash. 99352
Telephone (509) 943-4661

March 10, 1980

District Director
U.S. Immigration and Naturalization
Service
815 Airport Way, South
Seattle, WA 98134

Re: Elias Sandoval-Sanchez
No. A 22 346 925

Dear Sir:

I enclosed in duplicate Motion and Affidavit for re-opening
and my check for the re-opening fee in the amount of \$25.00
pursuant to 8 CFR 103.7.

Sincerely yours,

/s/ Charles H. Barr

CHARLES H. BARR
Attorney at Law
CHB/imp
Encls.

cc: Ken Warren

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

Matter of:
ELIAS SANDOVAL-SANCHEZ
RESPONDENT
(A-22 346 925)

MOTION TO RE-OPEN

Before the Immigration Judge, The Honorable Newton T. Jones

Comes now the Respondent, Elias Sandoval-Sanchez by and through his undersigned attorney and hereby moves the Immigration Judge to re-open the deportation proceedings herein, this matter having ceased to be within the jurisdiction of the Board of Immigration Appeals by virtue of its decision of February 21, 1980 denying Respondent's Appeal. This Motion is based upon the annexed Affidavits and the decision in *United States vs. Calderon-Medina*, 591 F.2d 529 (9th Circuit 1979), and *Jose Madrigal-Torres vs. Immigration Service*, 9th Circuit No. 78-2182, dated 8/13/79, and upon the decision of the Board of Immigration Appeals in re Reyes Lopez-Mendoza No. A22 734 975 of July 25, 1979. The referenced cases were all decided subsequent to the instant Respondent's appeal and relate to the matters alleged in the annexed Affidavits.

/s/ Charles H. Barr

CHARLES H. BARR
Attorney for Respondent

I certify that a copy of this instrument was mailed postage prepaid this 21st day of MAR, 1980 to Kendell Warren, Trial Attorney for INS

/s/ Charles H. Barr

CHARLES H. BARR
Attorney for Respondent

UNITED STATES DEPARTMENT OF JUSTICE
IMMIGRATION AND NATURALIZATION SERVICE

Matter of:
ELIAS SANDOVAL-SANCHEZ
RESPONDENT

A-22 346 925
AFFIDAVIT IN SUPPORT OF
MOTION TO RE-OPEN

State of Washington
County of Benton

Elias Sandoval-Sanchez, being first duly sworn on oath deposes and says: I am the Respondent in the above captioned matter. I was arrested by the Immigration and Naturalization Service on June 23, 1977 at the Rogers of Walla Walla potato processing plant near Pasco, Washington. That property is private property. I was arrested without a warrant for my arrest. Following my arrest I was examined by the same officer who arrested me despite the fact, as evidenced by the testimony at the deportation proceeding, that there were other officers readily available to examine me, in violation of 8 CFR 287.3.

When I was arrested without a warrant I was not advised of the reason for my arrest, nor of my right to be represented by counsel of my own choice at no expense to the government, I was not advised of the fact that any statement that I might make could be used against me in a subsequent proceeding, all in violation of 8 CFR 287.3. At no time at or subsequent to my arrest was I ever advised by any officer of the service, as required by 8 CFR 242.2(e), that I could communicate with the consular or diplomatic officers of my country of nationality in the United States. These violations by the Service of its own regulations deprived me of due process and were materially prejudicial to my defense of the subsequent proceedings against me.

The foregoing information was given^e by me in the Spanish language to Charles H. Barr and interpreted back to me

by him from the English language above into Spanish, and I know the contents of the foregoing and they are true and correct.

/s/ Elias Sandoval

ELIAS SANDOVAL-SANCHEZ

Subscribed and sworn to before me this 21st day March, 1980.

/s/ Charles H. Barr

Charles H. Barr, Notary Public in and for the State of Washington residing at Pasco.

I certify that a copy of this instrument was mailed postage prepaid this 21st day of MAR, 1980 to Kendell Warren, Trial Attorney for INS

/s/ Charles H. Barr

CHARLES H. BARR
Attorney for Respondent

NOTICE OF ENTRY OF APPEARANCE AS ATTORNEY OR REPRESENTATIVE

| | |
|---|---------------------------------|
| In re: Elias SANDOVAL-Sanchez | DATE JANUARY 18, 1978 |
| | FILE No. A22 346 925 |

I hereby enter my appearance as attorney for (or representative of), and at the request of, the following named person(s):

| | | |
|--|--------------------------------------|------------------------------------|
| NAME | <input type="checkbox"/> Petitioner | <input type="checkbox"/> Applicant |
| | <input type="checkbox"/> Beneficiary | <input type="checkbox"/> |
| ADDRESS (Apt. No.) (Number & Street) (City) (State) (ZIP Code) | | |

| | | |
|--|--------------------------------------|------------------------------------|
| NAME | <input type="checkbox"/> Petitioner | <input type="checkbox"/> Applicant |
| | <input type="checkbox"/> Beneficiary | <input type="checkbox"/> |
| ADDRESS (Apt. No.) (Number & Street) (City) (State) (ZIP Code) | | |

Check Applicable Item(s) below:

| | |
|--|---|
| <input type="checkbox"/> 1. I am an attorney and a member in good standing of the bar of the Supreme Court of the United States or of the highest court of the following State, territory, insular possession, or District of Columbia | |
| | (Name of Court) |
| | and am not under a court or administrative agency order suspending, enjoining, restraining, disbaring, or otherwise restricting me in practicing law. |
| <input type="checkbox"/> 2. I am an accredited representative of the following named religious, charitable, social service, or similar organization established in the United States and which is so recognized by the Board: | |
| <input type="checkbox"/> 3. I am associated with _____ the attorney of record who previously filed a notice of appearance in this case and my appearance is at his request. (If you check this item, also check item 1 or 2 whichever is appropriate.) | |
| <input type="checkbox"/> 4. Others (Explain fully.) | |
| <i>No response removed from file 1-10-78</i> | |
| SIGNATURE | COMPLETE ADDRESS |
| NAME (Type or Print) Charles H. Barr, Esquire | TELEPHONE NUMBER |

PURSUANT TO THE PRIVACY ACT OF 1974, I HEREBY CONSENT TO THE DISCLOSURE TO THE FOLLOWING NAMED ATTORNEY OR REPRESENTATIVE OF ANY RECORD PERTAINING TO ME WHICH APPEARS IN ANY IMMIGRATION AND NATURALIZATION SERVICE SYSTEM OF RECORDS:

(Name of Attorney or Representative)

THE ABOVE CONSENT TO DISCLOSE IS IN CONNECTION WITH THE FOLLOWING MATTER:

NAME OF PERSON CONSENTING

SIGNATURE OF PERSON CONSENTING

DATE

(NOTE: Execution of this box is required under the Privacy Act of 1974 where the person being represented is a citizen of the United States or an alien lawfully admitted for permanent residence.)

NOTICE OF APPEAL TO THE
BOARD OF IMMIGRATIONS APPEALS

SUBMIT IN TRIPLICATE TO:
IMMIGRATION AND NATURALIZATION SERVICE
815 Airport Way South
Seattle, Washington 98134

In the Matter of: File No. A22 346 925
Elias Sandoval-Sanchez

1. I hereby appeal to the Board of Immigration Appeals from the decision, dated October 7, 1977, in the above entitled case.
2. Briefly, state reasons for this appeal. The Judge erred in admitting Exhibit 3 (form I-213) into evidence in that no proper foundation was laid and because the information placed thereon was obtained involuntarily from Respondent while he was in custody of the Service in actual physically coerced detention in jail without being priorly advised of his full right to counsel, without being afforded an actual opportunity to consult counsel as he requested and without being advised by his right to silence and the full Miranda warnings as required by due process and by the Service's Regulations and without the use of form I-214. Respondent's initial detention and arrest deprived him of due process and was ultra vires the Service's lawful authority and was based upon illegal search and was lacking in probable cause but was invidiously racially discriminatory and therefore suspect. Respondent was arrested without a warrant although there was no likelihood he would flee. The Judge erred in not granting Respondent's Motion to Terminate proceedings because of lack of jurisdiction based on an invalid Order to Show Cause and illegal procedure violative of the fourth amendment tainting the proceedings. Deporting [t]he Respondent would be defacto deportation of his U.S. citizen child born March 18, 1977 at Pasco and would therefore be ultra vires the Service's lawful authority.

3. I do desire oral argument before the Board of Immigration Appeals in Washington, D.C.
4. I am filing a separate written brief or statement. A copy of the transcript of hearing is requested.

An additional period of 30 days from receipt of the transcript in which to file Respondent's brief is requested.

/s/ Charles H. Barr

Charles H. Barr
P.O. Box 2733, Tri-Cities, Wa. 99302

October 17, 1977

Form I-290A
(Rev. 4-1-76)N

IMMIGRATION JUDGE HEARING WORKSHEET AND MEMORANDUM OF DECISION

Place Spokane File No. A-22 346 925 Counsel or Representative Charles H. Barr
 Respondent or Applicant ELIAS SANDOVAL-SANCHEZ Trial Attorney [Signature]
 Address 311 W. Agate, Apt. D, Pasco, WA 99301 Interpreter [Signature] Language Spanish

☒ DEPORTATION HEARING Deportability ☒ Contested ☐ Not Contested
 OSC charge 241(a)(2), entry without inspection ☐ Sustained ☐ Not Sustained
 Lodged [Signature] ☐ Sustained ☐ Not Sustained
 Application [Signature]
 Deportation country: Mexico
 Choice Mexico Directed Or
 243(h) requested as to

☐ EXCLUSION HEARING Application Country of birth
 Grounds: 1. I&N Act Sec. 212(a)() ☐ Excludable ☐ Not Excludable
 2. I&N Act Sec. 212(a)() ☐ Excludable ☐ Not Excludable

☐ BOND PROCEEDINGS Application Decision
 PROCEEDINGS REOPENED ON 7/13/77 IMMIGRATION JUDGE
 On Adjourned to For
 On Adjourned to For
 On Adjourned to For
 COMPLETED ON 7/13/77 IMMIGRATION JUDGE NEWTON T. JONES

DECISION: [Signature] Date: 10-2-77
☐ Oral ☐ Reserved ☒ Written Appeal: ☐ Waived Reserved by ☒ Alien ☐ Trial Attorney
☒ Transcribe ☒ Hearing ☐ Decision Appeal due 10-2-77 10-21-77
☐ Transcript to Attorney ☐ Information copy of oral decision

REMARKS:

Documents To Be Submitted

- ☐ Character affidavits
☐ Character Inv.
☐ Employment Statement
☐ Other

31

NOTICE OF ENTRY OF APPEARANCE AS ATTORNEY OR REPRESENTATIVE

| | |
|------------------------|----------|
| In re: | DATE |
| ELIAS SANDOVAL-SANCHEZ | 6-28-77 |
| | FILE No. |
| | A |

I hereby enter my appearance as attorney for (or representative of), and at the request of, the following named person(s):

| | | |
|--|--------------------------------------|--|
| NAME | <input type="checkbox"/> Petitioner | <input type="checkbox"/> Applicant |
| ELIAS SANDOVAL-SANCHEZ | <input type="checkbox"/> Beneficiary | <input checked="" type="checkbox"/> Respondent |
| ADDRESS (Apt. No.) (Number & Street) (City) (State) (ZIP Code) | | |
| 311 W. Agate, Apt. D PASCO WA. 99301 | | |
| NAME | <input type="checkbox"/> Petitioner | <input type="checkbox"/> Applicant |
| | <input type="checkbox"/> Beneficiary | <input type="checkbox"/> |
| ADDRESS (Apt. No.) (Number & Street) (City) (State) (ZIP Code) | | |

Check Applicable Item(s) below:

| | |
|---------------------------------------|--|
| <input checked="" type="checkbox"/> 1 | I am an attorney and a member in good standing of the bar of the Supreme Court of the United States or of the highest court of the following State, territory, insular possession, or District of Columbia <u>Washington</u> <u>Supreme</u> and am not under a court or administrative agency order suspending, enjoining, restraining, disbaring, or otherwise restricting me in practicing law. |
| <input type="checkbox"/> 2 | I am an accredited representative of the following named religious, charitable, social service, or similar organization established in the United States and which is so recognized by the Board: |
| <input type="checkbox"/> 3 | I am associated with _____ the attorney of record who previously filed a notice of appearance in this case and my appearance is at his request. (If you check this item, also check item 1 or 2 whichever is appropriate.) |
| <input type="checkbox"/> 4 | Others (Explain fully.) |
| SIGNATURE | COMPLETE ADDRESS |
| | P.O. Box 2733 |
| NAME (Type or Print) | TRI-CITIES, WA. 99302 |
| CHARLES H. BARR | TELEPHONE NUMBER |
| | (509) 943-4661 |

RECEIVED
JUL 1 5 10 AM '77
IM & NATZ SER
SPOKANE, WASH.

PURSUANT TO THE PRIVACY ACT OF 1974, I HEREBY CONSENT TO THE DISCLOSURE TO THE FOLLOWING NAMED ATTORNEY OR REPRESENTATIVE OF ANY RECORD PERTAINING TO ME WHICH APPEARS IN ANY IMMIGRATION AND NATURALIZATION SERVICE SYSTEM OF RECORDS: CHARLES H. BARR
(Name of Attorney or Representative)

THE ABOVE CONSENT TO DISCLOSE IS IN CONNECTION WITH THE FOLLOWING MATTER: A11

32

| | | |
|---------------------------|--------------------------------|---------|
| NAME OF PERSON CONSENTING | SIGNATURE OF PERSON CONSENTING | DATE |
| ELIAS SANDOVAL-SANCHEZ | | 6-28-77 |

(NOTE: Execution of this box is required under the Privacy Act of 1974 where the person being represented is a citizen of the United States or an alien lawfully admitted for permanent residence.)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service
MATTER OF ELIAS SANDOVAL-SANCHEZ
Respondent
IN DEPORTATION PROCEEDINGS
File A-22 346 925
TRANSCRIPT OF HEARING

Before: NEWTON T. JONES, Immigration Judge

Date: July 13, 1977

Place: Spokane, Washington

Transcribed by Arlean F. Fay
At Seattle, Washington

Official Interpreter Mrs. Orosia Sada de McHugo

Language Spanish

APPEARANCES:

For the Service:

Kenneth D. Brant
Acting Trial Attorney
Spokane, Washington

For the Respondent:

Charles H. Barr, Esq.
P.O. Box 2733
Tri-Cities, Washington 99302

IMMIGRATION JUDGE: This is Spokane, Washington, July 13, 1977. My name is Newton T. Jones and I am an Immigration Judge. This is a deportation hearing in the case of Elias Sandoval-Sanchez, A22 346 925. Present, in addition to respondent, is Charles H. Barr of P.O. Box 2733, Tri-Cities, Washington 99302, who has entered his appearance as attorney for the respondent. Also present is Kenneth Bryant, Acting Trial Attorney, Spokane, Washington. This hearing is being conducted through the services of—

INTERPRETER: Orosia McHugo.

IMMIGRATION JUDGE: —official Spanish interpreter for the Immigration and Naturalization Service.

IMMIGRATION JUDGE TO RESPONDENT (through official interpreter):

Q What language do you speak and understand best, sir?

A Spanish.

Q We will then conduct this hearing in the Spanish language. Will you please stand and raise your right hand. Do you solemnly swear the statements you are about to make in this hearing will be the truth, the whole truth, and nothing but the truth, so help you God?

A Yes.

Q Please be seated. What is your name?

A Elias Sandoval.

IMMIGRATION JUDGE: All right. The Order to Show Cause, Mr. Barr, is marked *Exhibit No. 1*. A copy was served on the respondent on June 24, 1977. Now, Mr. Barr, this Order to Show Cause has four allegations. Are you in a position at this time to plead to any or all of the four allegations contained in the Order to Show Cause?

COUNSEL: May I see the order?

IMMIGRATION JUDGE: Yes. We will go off the record while I give the attorney for the respondent the Order to Show Cause. Off the record. All right, back on the record. All right, Counsel, are you ready to plead to the allegations?

COUNSEL: Yes, your Honor.

IMMIGRATION JUDGE: How do you plead to the four allegations?

COUNSEL: Prior to pleading, your Honor, I would object to the Order to Show Cause. It appears that it has been signed by some one on behalf of Joseph M. Swing. Following that signature there are the initials "RJK," which appear to correspond on the name shown on the reverse, as the person who served the Order to Show Cause, one Robert J., last name illegible, which begins with a "K," after which there appear some initials, which I believe read "PAIC."

IMMIGRATION JUDGE: All right. That stands for Patrol Agent in Charge, Mr. Barr, and the Order to Show Cause I have wasn't signed by anybody but Mr. Swing. It appears "Joseph M. Swing." I think that is his signature.

COUNSEL: The order that I have has been signed twice and the signatures are distinctly different, your Honor. It appears that Mr. Swing's own signature was put on this document sometime after it was served.

IMMIGRATION JUDGE: Well, Counsel, I am working on this document right here, the one I marked Exhibit No. 1. It shows it was signed by Joseph M. Swing. Now, it does show that Mr. Robert J. Keeum (phonetic)—

ACTING TRIAL ATTORNEY: Keim, I believe.

IMMIGRATION JUDGE: —Keim, Patrol Agent in Charge, served it on June 24th.

COUNSEL: Whereas an exhibit in connection with this motion then, your Honor, the copy of the Order to Show Cause which—

IMMIGRATION JUDGE: Marked *Exhibit 2*. Counsel, your motion is denied. Are you ready to proceed with something else?

COUNSEL: In support of that I would note that the regulations authorize District Directors and certain specified Officers in Charge of suboffices, and that would include the Officer in Charge of the Spokane office, would be authorized, but no one else.

IMMIGRATION JUDGE: Mr. Bryant, does the District sometimes authorize Orders to Show Cause telephonically?

ACTING TRIAL ATTORNEY: Yes, they do.

IMMIGRATION JUDGE: All right. Go to something else, Counsel. Your motion is denied.

COUNSEL: Pertaining the objection as a continuing objection.

IMMIGRATION JUDGE: It is a continuing objection.

COUNSEL: We would deny Allegations 1, 2—

IMMIGRATION JUDGE: 3 and 4?

COUNSEL: 1, 2, 4, and the conclusion of deportability, and admit Allegation No. 3, with the clarification that the date of entry was the 4th of June, 1976, and that the manner of entry was on foot.

IMMIGRATION JUDGE: All right, Mr. Bryant, Allegations 1, 3, and 4 have been admitted. Allegations No—pardon me. 1, 2—3 has been admitted. Allegations 1, 2, and 4 denied. Are you ready to proceed?

ACTING TRIAL ATTORNEY: Yes, Judge.

IMMIGRATION JUDGE: Before you do so, let me ask the respondent a question.

IMMIGRATION JUDGE TO RESPONDENT (through official interpreter):

Q In case it becomes necessary to deport you, to which country do you wish to be deported?

COUNSEL: Your Honor, that will be to Mexico.

IMMIGRATION JUDGE: All right. Mr. Bryant, you may proceed.

ACTING TRIAL ATTORNEY: I would like to present as exhibit "Record of Deportable Alien, Form I-213, in the name Elias Sandoval-Sanchez.

COUNSEL: I object to the admission of Forms I-213 on the grounds that, first of all, there is no foundation and, secondly, that the information obtained thereon was obtained in violation of the defendant's rights, without having been advised of his Miranda rights and when he had, after he had already asked for counsel and had not been afforded an opportunity to communicate with counsel.

IMMIGRATION JUDGE: All right. At this point, Counsel, your objection is overruled. I am going to admit it into the record as an exception hearsay rules since it is in the name of Elias Sandoval-Sanchez and it contains his alien registration number, which is the same as that appearing

on the Order to Show Cause, the name is the same as that appearing on the Order to Show Cause. Your objection is overruled. I am going to mark it *Exhibit No. 2*.

COUNSEL: I further object to the admission on the grounds of hearsay, your Honor.

IMMIGRATION JUDGE: All right. It is an exception to hearsay. It is a document kept in the regular course of business. Is that true, Mr. Bryant?

ACTING TRIAL ATTORNEY: Yes.

COUNSEL: I would like to voir dire Mr. Bryant on that.

IMMIGRATION JUDGE: —voir dire Mr. Bryant on it because if you can voir dire Mr. Bryant, you can voir dire your client if you want to.

COUNSEL: It is his motion and there has been no testimony as to who prepared this and Mr. Bryant is not testifying here. He's the Trial Attorney, and this has to be introduced through the person who made it, not Mr. Bryant.

IMMIGRATION JUDGE: It does not, Counsel. I make an exception to the hearsay. It is a document kept in the regular course of business. Is this true?

ACTING TRIAL ATTORNEY: That is correct.

COUNSEL: Mr. Bryant is not sworn, your Honor. Mr. Bryant is not a witness. Mr. Bryant is the Acting Trial Attorney.

IMMIGRATION JUDGE: Mr. Bryant is the Acting Trial Attorney. I have accepted a document and marked it *Exhibit No. 3*. If you desire to go to something else, you may do so.

ACTING TRIAL ATTORNEY: I would call a witness, Judge.

IMMIGRATION JUDGE: All right. Who do you wish to call?

ACTING TRIAL ATTORNEY: Investigator Michael Bower.

IMMIGRATION JUDGE: All right, you may do so.

IMMIGRATION JUDGE TO WITNESS:

Q All right. Will you please state your name?

A Michael J. Bower.

Q And your address?

A 691 U.S. Courthouse, Spokane, Washington.

Q Do you solemnly swear the statements you are about to make in this hearing will be the truth, the whole truth, and nothing but the truth so help you God?

A I do.

IMMIGRATION JUDGE: Have a seat, please. All right, Mr. Bryant.

ACTING TRIAL ATTORNEY TO WITNESS:

Q Mr. Bower, how long have you been employed by the Immigration Service?

A A little over seven years.

Q And assigned to the Spokane office, how long?

A Three and a half years.

IMMIGRATION JUDGE: Do you wish to see the exhibit, Mr. —

ACTING TRIAL ATTORNEY: May I see the exhibit, No. 3, I believe it is?

IMMIGRATION JUDGE: Yes. Let me initial it down here before I hand it to you. All right, you may continue.

ACTING TRIAL ATTORNEY TO WITNESS:

Q Do you have a recollection of the name Elias Sandoval?

Q Yes, I do.

Q And could you relate when you first encountered the subject?

A I first encountered the subject at Rogers Walla Walla Processing Plant, approximately June 23, 1977.

Q And you were at the plant called Rogers Walla Walla in Pasco, Washington, on official business?

A Yes, I was.

Q And you were at that time accompanied by other officers?

A Yes, I was.

Q And had you made prior arrangements to be at Rogers Walla Walla?

A Yes, I had contacted the personnel manager, obtained his permission to check for illegal aliens at the processing plant.

Q And had you in the course—

COUNSEL: Objection to the statement that he obtained permission from the personnel manager. This is pure hear-

say unless the personnel manager is here to testify that he gave him permission.

IMMIGRATION JUDGE: Overruled, Counsel.

ACTING TRIAL ATTORNEY TO WITNESS:

Q And during the course of your duties, Mr. Bower, had you previously arrested or apprehended illegal aliens who had been employed at Rogers Walla Walla?

A Yes, I have.

Q Could you possibly remember whether this number was numerous number or a few or approximately how many within the past month or two months?

A In the past two months I would approximate sixty illegal aliens were encountered who had been working at Rogers Walla Walla.

Q And would you relate what your procedure was at your arrival at Rogers Walla Walla on the day, I think it was indicated June 23, 1977?

A Some of the officers surrounded the plant to guard the exits on the four sides of the plant. Another and I initially went into the lunch room area and then through to the main part of the plant itself to check for illegal aliens.

Q This was after you had contacted the officials at the plant?

A Yes, it was, and the personnel manager accompanied us inside the plant and showed us where we should go and where we shouldn't.

Q And could you relate how you encountered Mr. Sandoval?

A I can't be absolutely certain about how I encountered any one of the subjects that we encountered at that time. There were so many of them that I can't possibly remember where and which ones I encountered.

Q How many illegal aliens were encountered at Rogers on that particular day?

A I believe the total was 37.

IMMIGRATION JUDGE: Mr. Barr, I wish you wouldn't speak with your client during the course of the hearing. If you want to go off the record, you let me know and you can speak to your client then, but—

COUNSEL: May we go off the record?

IMMIGRATION JUDGE: All right, we will go off the record. Off the record. Back on the record. I would appreciate hereafter if you would wait until after testimony of the witness is taken before you wish to consult with your client, Mr. Barr. Don't break into the witness's testimony. All right, Mr. Bryant, you may continue. Now, I think I missed something there. How many were, approximately, encountered on this last occasion, Mr. Bower? Did you mention that number yet?

WITNESS: Yes. I believe it was approximately 37.

IMMIGRATION JUDGE: And would these have been illegal aliens it was determined?

WITNESS: Yes.

ACTING TRIAL ATTORNEY TO WITNESS:

Q Were these all taken into custody, Mr. Bower?

A Yes, there were all taken into custody at this time. Some were released later.

Q All right. Where were you stationed during this inquiry?

A Initially in the lunch room, as there was a shift change, and that was where a large group of people were at that time and then later during the shift change I was stationed at the main entrance into the plant where all the people would normally go into the plant and come out of the plant.

Q And was there some confusion during that period? Were people running?

A Yes, there was—

COUNSEL: Objection to leading question, your Honor.

WITNESS: There was a lot of confusion.

IMMIGRATION JUDGE: All right, Mr. Bower, you can—I mean, Mr. Bryant, you can rephrase the question.

ACTING TRIAL ATTORNEY TO WITNESS:

Q All right. Mr. Bower, what type of confusion was there?

A Well, when we first entered the lunch room section, many people that were seated got up and started to head for whichever exits were available or just mill around. When we went into the plant area itself, some people started running, left their equipment. Those that were try-

ing to get into the plant were turning around and walking back out.

Q Had you reason to believe that there was no doubt as to who you were or the officers with you?

COUNSEL: Objection, your Honor. He can't testify as to what the persons in the lunch room believed.

ACTING TRIAL ATTORNEY: I think he can. He's an experienced officer.

COUNSEL: Well, however experienced he may be, he's not a mind reader. He hasn't qualified—

IMMIGRATION JUDGE: I will have to sustain that objection. Mr. Bryant. You can bring it out in some other way if you desire to do so.

ACTING TRIAL ATTORNEY TO WITNESS:

Q Had you identified yourself as an Immigration Officer?

A I identified myself as an Immigration Officer and the other officer with me was dressed in Border Patrol uniform.

COUNSEL: Objection. We haven't been told to whom this identification was made. He has indicated—

IMMIGRATION JUDGE: Well, maybe we will get to that, Mr. Barr—

COUNSEL: —he identified himself to the personnel—

IMMIGRATION JUDGE: —maybe he is getting to that. If you want to bring that out later, fine. But maybe he is driving at that.

ACTING TRIAL ATTORNEY TO WITNESS:

Q I believe you said there was a Border Patrol officer there in uniform?

A This is correct.

Q It is a distinctive uniform, it is not, and it indicates—

COUNSEL: Objection, to these leading questions, your Honor.

IMMIGRATION JUDGE: All right. Rephrase it, Mr. Bryant.

ACTING TRIAL ATTORNEY TO WITNESS:

Q There was an officer there dressed in a Border Patrol uniform, is that correct?

COUNSEL: Objection, your Honor.

IMMIGRATION JUDGE: That is overruled. He can ask that.

A That is correct.

ACTING TRIAL ATTORNEY TO WITNESS:

Q I see. Let's go on to the respondent. Do you have any positive recollections where you had contact with the respondent?

A No positive recollections.

Q Could it possibly have been in the lunch room or in any other part of the plant?

A I would assume, I would just be guessing to tell you the truth, I am not sure where I encountered him in the plant.

Q Did you speak to the respondent?

A I'm personally not sure whether I spoke to him and detained him in the plant or whether it wasn't until afterwards that I spoke with him.

Q You did interview Mr. Sandoval, did you, at that time or later, execute the normal paper work, which is necessary in recording the presence of an illegal alien?

COUNSEL: Objection, your Honor, the question has not indicated when as a point in time. He says, "at that time," We'd have no knowledge of what time he means.

IMMIGRATION JUDGE: Mr. Barr, it seems that we are talking about the day of this apprehension and the day they were in the plant. I would gather that from the information. I am going to overrule your objection. I will let him answer.

COUNSEL: Does the question relate to the plant?

IMMIGRATION JUDGE: I have overruled your objection, Mr. Barr. The witness can answer the question.

WITNESS: Yes, all the aliens that were initially detained in the plant were transported to the Franklin County Jail and processed in the training room of the Pasco Police Department, and that is when I processed him on "Record of Deportable Alien."

IMMIGRATION JUDGE TO WITNESS:

Q Is he sitting in this hearing room, the one you are referring to, Mr. Bower?

A Yes, he is.

Q Will you point him out to me, please.

A He is seated to my right in the blue shirt.

IMMIGRATION JUDGE: All right. Let the record reflect that the witness identifies the respondent.

ACTING TRIAL ATTORNEY TO WITNESS:

Q Did you—

COUNSEL: Would you let the record reflect there is no other persons here, other than the interpreter, the witness, the Trial Attorney, Counsel, and the Judge, and the respondent.

IMMIGRATION JUDGE: I think I asked him if he recognized him.

ACTING TRIAL ATTORNEY TO WITNESS:

Q I will now show you Exhibit No. 3 and ask you if you recognize this form?

A Yes, I do.

Q And did you execute this form?

A Yes, I did.

Q And does it relate to the respondent?

A Yes, it does.

Q And in your questioning of the respondent, did he indicate to you where he was born?

COUNSEL: Objection.

IMMIGRATION JUDGE: The document speaks for itself, Mr. Bryant.

ACTING TRIAL ATTORNEY TO WITNESS:

Q Then, Mr. Bower, this is an accurate recording of your interview with Mr. Sandoval?

A Yes.

IMMIGRATION JUDGE: Anything further, Mr. Bryant?

ACTING TRIAL ATTORNEY: No further questions.

IMMIGRATION JUDGE: All right, Mr. Barr.

COUNSEL TO WITNESS:

Q —was it that you went to the Rogers plant?

A It was ten minutes to three p.m.

Q 2:50 p.m. What is the name of the personnel manager at Rogers?

A Chuck Moreby.

Q You identified yourself to him as an immigration officer?

A Yes. I have had dealings with Mr. Moreby in the past.

IMMIGRATION JUDGE TO WITNESS:

Q In other words, he knew you to be an immigration officer?

A Yes, he did.

COUNSEL TO WITNESS:

Q At what time was it that you set up your check points about the plant and inside it?

A Ten minutes to three.

Q And did you with a loud speaker or loud voice advise all the persons within shouting distance of you that you were Border Patrol and Immigration Officers?

A The Border Patrolman and I, as we entered, as soon as we could be visually seen by the majority of the people in the lunch room, identified ourselves in loud voices as being Immigration Officers.

Q It was at that moment that the confusion arose and people milled about?

A Yes. Well, I will qualify that. They were already starting to mill about. They could see us walking in there.

Q Now, after you entered, did other people continue to enter the plant for the shift change?

A A few people did, yes.

Q And did you—You say you stationed yourselves at the main entrance to the work area of the plant?

A That is correct.

Q And who else was with you there?

A A Border Patrol Agent.

Q Is that Mr. Spence?

A Yes, it is.

Q And how did you handle the procedure as people lined up to enter the plant at that interior entrance?

A We had already arrested two or three aliens and we were looking for a place to detain them, as there was only two of us, and there happened to be a men's rest room and clean up area right at the entrance to the plant. Mr. Spence

stayed at the door there to that and I and he both were at the door to the main entrance to the plant, a swinging door.

Q You and he were both at the main entrance?

A Right.

Q Did one of you go down the line and ask various people questions as they waited to enter?

A We both waited for the lines to file past us. Those that we considered to be illegal aliens, we talked to. Those that we didn't, we didn't talk to.

Q And as you— What— Could you tell us each and every factor that led you to conclude that the respondent here was a person you considered likely to be an illegal alien and, therefore, you interrogated?

A Mr. Spence and my—I can speak for myself for sure—method at that point of time was, most of them were putting their heads down, turning their heads to the sides, avoiding eye contact, trying to get into a tight group of people going through, and my initial questioning of anybody was, "Good day outside?" "Hard work here?" "Do you make lots of money here?" Any kind of questions in English.

Q Were these questions in English or Spanish?

A They were all in English. People that responded in English and answered all the questions in English, I wouldn't continue to talk to. Those that couldn't answer in English, appeared to have a dumb look on their face, didn't know what was going on, and would usually almost start to move towards me as if they had known they were caught and the game was up, at that point I would interrogate them in Spanish as to their right to be and remain in the United States.

Q And what was the question, your initial question in Spanish to those persons?

A Whether they had papers to be in the United States.

Q You spoke in Spanish. What did you use? Just the two words, "Tiene papeles?"

A That would be the initial question, yes.

Q Your practice is, as I take it, not to ask, "Do you have immigration papers?" But just, "Do you have papers?" Is that correct?

A That is correct.

Q Now, you don't remember, I take from what your responses were to Mr. Bryant, when you had contact or whether you had contact with the respondent here inside the plant?

A No. I'm sure Mr. Spence and I were directly responsible for probably 90 or maybe even 95 of the total apprehensions.

Q You divided your work equally, the two of you, there?

A The way the line was filing past, I would get one, he would get one, I'd get two, he'd get one, he'd get two, I'd get one.

Q What is there, about a 50-50 chance then that you handled this respondent?

A I would say, yes, there was about a 50-50 chance.

Q If you had handled him though, wouldn't you remember him at all?

A I have a recollection, but I can't say it was absolutely positive. I could only say what I think, what I believe.

Q This processessing [sic], this is a food processing plant there?

A A potato processing plant.

Q And when the workers go into work, they wear head apparel and face mask or hair mask or something like that for sanitary or Government reasons?

A They were all dressed with a white apron or plastic, so I suppose it would check the food particles or whatever, and a white hard hat-type thing.

Q They had a white hard hat. Did some of them have a gauze mask or something over their face area?

A I don't remember any gauze masks as people were entering or coming out. I saw them when they were inside the plant they had them on, but when they were coming in or out, they didn't have them on.

Q This line that was formed where you were was for people who were going to enter inside and start their shift, right in the actual work area?

A They were coming both ways. There was one line going in and a line of people coming out.

Q Were you checking the line going in or the line going out?

A Both.

Q O. K. I could understand the line coming out not having masks placed, but did the line going in have masks placed that you recall?

A I don't believe— A few of them may have but, as far as I can remember, I don't think most of them. I am almost sure most of them didn't have. They were expecting us to talk to them, I believe.

Q Was the respondent entering work or was this the end of his shift there?

A As I said before, I can't be positive. I think that is an individual who was coming out of the plant and I believe I was the one that initially talked to him. He said he had a wife that was at the plant. I further questioned him as to whether she was a citizen or alien and whether she was here illegally [sic] or not, and at that time he wanted to know where— He wanted to go get his wife. I detained him and told him we would get his wife as soon as we were done checking everybody.

Q Then more probably than not you were the person who effected this respondent's arrest there at the plant?

A I think it is very probable but I can't be absolutely positive.

IMMIGRATION JUDGE: All right, Transcriber, I am going to turn the cassette. All right, Transcriber, this is Side No. 2.

COUNSEL TO WITNESS:

Q Mr. Bower, did you have a warrant for the arrest of this respondent at the time you went to Rogers plant?

A No, I did not.

Q Did you have a warrant for the arrest of any other individual respondent when you went to the plant?

A No, I did not.

Q Did you have an area search warrant for the plant?

A No, I did not.

Q Did you have a specific search warrant for the plant?

A No, I did not.

Q When you spoke with Chuck Morely, did you ask him whether he had authority for the plant to consent to your search?

A He also checked with his superiors and he gave me consent to check the plant.

Q Did he affirmatively represent to you that he had authority for the company to consent to your search?

IMMIGRATION JUDGE: Well, I think he said he went to his superiors.

WITNESS: Yes, he did, and we have had a conference with him in the past with his superior and the plant manager at that time and they said they would not require a search warrant in order to check their plant.

COUNSEL TO WITNESS:

Q At any time?

A At any time. They requested that we give them some advance notice was all.

Q How much advance notice was given in this instance?

A In this instance it was approximately thirty minutes advance notice given.

Q Now, all of these people that you and Mr. Spence detained there were put into this rest room-wash area, all the men were?

A All the men were, yes.

Q And then this respondent would have been placed in there, too?

A Yes, he was.

Q Were they free to leave there?

A No, they were not.

Q Did you recall this respondent's having tried to walk away?

IMMIGRATION JUDGE: When?

COUNSEL TO WITNESS:

Q At any time after you entered the plant?

A If he was the subject I think is that told me about his wife being there and everything, when he was coming out of the plant, he turned around and walked away from me. I had to go to him to talk to him.

Q That is if he were the person who was leaving his shift at that time?

A That is correct.

Q If he were entering at first, it wouldn't be the same person, would it?

A No.

Q If he were entering the shift and you encountered him in the line waiting to go inside the work area, then he would have just been waiting and not attempting to leave in any way, wouldn't he?

A He would have been attempting to enter the plant to go on past me.

Q Would you consider that waiting to pass by you and enter on to his work duty station to be an effort to flee?

A No.

Q O. K. Do you recall whether this particular person had his head down when you interrogated, when you decided to interrogate him?

A Only if he was the subject that I described earlier as trying to come out of the plant that had the wife. He was very evasive. I cannot say if he was one of them entering the plant.

Q If he was not that person that you are thinking of, then you have no recollection of his waiting in line with his head down or head to the side or avoiding eye contact?

A Not him personally. We have established before whenever we are going to search a large number of people like these that we will have probable cause and what are some good instances of probable cause in order to talk to these people.

Q Your sole criteria other than these head and eye movements was whether they spoke English or not?

IMMIGRATION JUDGE: I don't think the witness said that those were his sole criteria. There might be others, Many, many more. There might be haircuts. There might be particular type of mustache a person would have. Might be the clothing they wear. I think those just—

COUNSEL: Your Honor, I am trying to develop exactly that if you would permit me.

IMMIGRATION JUDGE: But I think we are just going after, you are fishing, Counsel. I have let you go on here for an hour practically.

COUNSEL: I assume we are on the record.

IMMIGRATION JUDGE: We are on the record, yes.

COUNSEL: Thank you. May I be permitted to continue?

IMMIGRATION JUDGE: You may be permitted to continue, yes.

COUNSEL TO WITNESS:

Q Would you answer the question?

A Would you repeat the question, please.

Q Was the sole factor other than the heads down, heads to side, avoiding eye contact, that you used in deciding to make the inquiry of the people, whether they spoke English or not in response to your questions?

A After establishing some reason to talk to them at all, why after I go through a few English questions, that to me is enough, if they can't understand or answer.

Q But if they do—

IMMIGRATION JUDGE: All right. I think the answer is—

COUNSEL TO WITNESS:

Q But if they do answer in English—

IMMIGRATION JUDGE: Mr. Barr, let's get the record straight.

IMMIGRATION JUDGE TO WITNESS:

Q What is sufficient to you, Mr. Bower? How do you figure out any requirements that would raise a suspicion in your mind, other than they can't speak English?

A When it comes to the point where I firmly believe that they are an illegal alien. It is something each officer develops, some sooner than some others.

Q Name a few items that you consider.

A Well, there is all kinds of items, depending on the circumstances where you encounter somebody. In this instance, where everybody was in a close, confined area, as people were entering, the eye contact, the evasive movements, trying to be bunched up in groups, being right next to somebody, or trying to walk in parallel with somebody to avoid being spoken to, were all—

Q Those elements that you considered, right?

A Yes.

COUNSEL TO WITNESS:

Q You specifically do not recall any of those items with reference to this respondent unless it turns out, after his testimony, that he was the person who was leaving his shift at that time?

A That is correct. I made sure on each one, each person we talked to, we established probable cause to talk to them.

Q And what factors made it— Why did you believe that he should have been detained then, since you didn't have a warrant for him?

A We just initially detained because of the large number of people coming in and out of there. I initially detain them to question them further. Some people immediately said they had United States citizen wife, or maybe United States citizen children, and would fall within a category that they may have something going for them. Some were detained for more interrogation to figure out whether they would be taken, left at the plant, or whether they would be further processed in the processing facility, which happens to be the Pasco Police Department in that area.

Q That is your complete rationale?

A Yes.

Q A large number of people, temporary detention, in order to investigate further at your convenience?

A A lot of them were talked to further there and ones that had wives, ones that had kids, ones that were single, determining which we handled in which manner, whether they should even be left there at the plant. For instance, I had one presented a document of some kind or another, wanted to talk to him more, at the time too busy talking to everybody else, he had to wait for further questioning.

Q How were these people who were detained there at the plant then transported to the Pasco Jail?

A They were transported in vans and cars.

Q Official vehicles?

A Yes.

Q How many officers then were at the police station when you began processing them?

A Oh, I can't remember for sure, ten or eleven.

Q And at that time you had 37, approximately, people that you were processing?

A That is correct.

Q And all of these ten or eleven assisted in the examination process?

A Very first process was, we had a bus waiting there to go to Mexico immediately and we asked for volunteers of who would like to leave then and there, separated a number to fill out the bus that were—

Q Approximately how many?

A I believe it was thirteen. Then after that, we processed those thirteen first, and the others were processed after that.

Q O. K. These approximately 24 people that were left yet were then processed by all of these ten or eleven officers?

A That is correct.

COUNSEL: If we can go off the record for a second, I have to catch up on my notes, your Honor.

IMMIGRATION JUDGE: All right, off the record. All right, on the record.

COUNSEL TO WITNESS:

Q Officer Bower, was there anything at all about respondent's wearing apparel that bespoke an alien to you?

A No. As I said before, they were all dressed with hard hats on and white aprons, white or clear-colored white, off white, aprons.

Q O. K. At the station, is it correct, that this group was advised en masse of its rights under Miranda and rights to counsel and so forth?

A They were advised en masse of the I-274 program where they can be returned voluntarily and not go through a deportation hearing.

Q In the course of that advice were these people told that they didn't have any rights to remain, as part of the explanation of that program?

A I wasn't physically present inside the "sally port," as it is called. I was outside. What I could just hear them asking for volunteers, explaining that we had a bus there, and

it was going to go, and who wanted to go now and who wanted to wait.

Q Then that wasn't an attempt to explain Miranda rights?

A No.

Q Do you know when and if the respondent was? Whether any of the officers, you, or any of the other officers, attempted to give the respondent any advice of the Miranda rights?

A I personally processed the respondent. He watched me process two or three family groups before him. When it was his turn, I asked him verbally first if he wanted to go back voluntarily or if he was interested in a deportation hearing and he indicated he didn't want to go back voluntarily. I then went over the Form I-274 process.

Q Which is that?

A This relates to voluntary departure from the United States.

Q I think we have mistracked here. My question is when did you advise respondent of his Miranda rights?

A In the Form I-274 it tells him about his right to counsel, etc.

Q Is this a Spanish language form?

A Yes, it is. It is Spanish-English.

Q And does it contain a place for a person to sign, acknowledging that the rights have been read to him and later on acknowledging that he is waiving those rights?

A It is not a form of Miranda rights, Miranda warning rights.

Q There is another form for that purpose, isn't there?

A Yes, there is.

Q What is the number of that form?

A 214.

Q A 214. Did you have Forms 214 with you?

A I am sure we probably did, in our processing.

Q You didn't use one with this respondent?

A No, I didn't.

Q So there is no waiver, no signed waiver of rights, or anything in your record, is there?

A Just my statement on the Form I-213 that he refused voluntary departure and refused to sign I-274.

Q O. K. Now, when— Is the statement of rights on the Form I-274 the same as the statement of rights on the 214?

A No, it is not.

Q What is it? It is an abbreviated form?

A It explains their right to a deportation hearing, right to counsel, and rights along that line, rather than enumerated six or five rights that are normally contained in a Miranda warning.

Q Recalling your processing of the respondent, do you recall that he couldn't read Spanish or English?

A Either he or his wife read to each other or they read it together. I remember them reading it and I believe read part of it together. It was explained more in more laymen's terms what it actually meant after they read it.

Q Did you learn as a result of your processing that he was uneducated?

A I didn't go into his educational background in my processing.

Q Did he at that time indicate that he wanted to talk with me in the language some of my clients use "Abogado Charlie?"

A No, he did not. Neither he nor his wife indicated they wished to communicate with you at that time.

Q Did he ask, say anything at all about wanting to talk to a lawyer?

A I don't believe until I was further through processing he indicated an attorney to represent him or he wanted a chance to be able to talk to an attorney to arrange bond and to be able to try to get his wife out to take care of the baby and at this point—

Q At what point in the processing was that indication made?

A I believe after I processed both him and his wife and told them what the next procedure would be and what the bond would probably be and this kind of stage, after they had declined a 274. I was explaining more of the 274 program to them and they were asking what the alternatives

were. That is when they requested to speak with you, I believe.

Q At the time that you were processing him, were there other officers that would have been available to have undertaken his processing?

A Yes. There was other officers. I took all of the family-type groups off in one corner of the room and was working on them. Most of the family groups, I won't say all.

Q You ascertained that respondent had a newly born child in Pasco. Is that correct?

A That is correct.

IMMIGRATION JUDGE: What does this have to do with the—

COUNSEL TO WITNESS:

Q You went out to the house?

IMMIGRATION JUDGE: —the part about the arrest, Counsel, he having a new child, a newly born child? What is that got to do with this part?

COUNSEL: Just wanted to establish whether he had or not ascertained that in his processing.

IMMIGRATION JUDGE: Well, go to something else, because that has nothing to do with what we are concerned with at this time.

COUNSEL: I would like to see the I-213—

IMMIGRATION JUDGE: You can bring that out later if you desire to do so.

COUNSEL: —your Honor.

IMMIGRATION JUDGE: All right.

COUNSEL TO WITNESS:

Q At the time that the Order to Show Cause was served on the respondent, had the original been signed personally by the District Director, Joseph M. Swing?

A No, it had not. We don't sign the original. That is up for the District Director to sign, or the authorizing officer to sign. We sign the copies occasionally in his name and put our initials down that it has been authorized.

Q That is what was done in this case?

A That is what was done in this case.

IMMIGRATION JUDGE: I note that the 213 shows that—

COUNSEL: Objection, your Honor. The 213 speaks for itself you indicated.

IMMIGRATION JUDGE: All right. I thought it was sort of— Well, I won't go into it.

COUNSEL: That is all the questions I have.

IMMIGRATION JUDGE: Mr. Bryant, anything further of this witness.

ACTING TRIAL ATTORNEY: No more questions.

COUNSEL: Your Honor, I would at this point move to suppress the I-213 and to terminate the proceedings on the grounds that the Department's own regulations require that the officer who makes the initial arrest is not to be the officer who examines the arrested person for their I-213 purposes but rather some other officer, and that the only exception to that is where there is no other officer available or would cause unnecessary delay. Mr. Bower's testimony has been quite clear here that there were a number of officers available to process and that there was in fact other officers available to do it at the time that Mr. Bower did process this particular respondent.

IMMIGRATION JUDGE: All right, Based on this record, your motion is denied, Counsel.

COUNSEL: I would further renew the motion to suppress the I-213 on the basis that there was no Form I-214 executed and that forms were available for that purpose and that there is no showing by the Government and there is a presumption against the Government on this matter. There is no showing that there was a knowing, intelligent, and voluntary waiver of his Miranda rights.

IMMIGRATION JUDGE: It is denied, Counsel. I think you are making the record as it doesn't stand. There was no exact statement that they had I-214s. He said, "They probably did." That doesn't mean that they had them on every case. Objection overruled.

COUNSEL: I'm not sure what stage in the proceedings we are at here.

IMMIGRATION JUDGE: Well, I am not suppressing the document.

COUNSEL: O. K.

IMMIGRATION JUDGE: And do you have anything further on the issue of deportability?

COUNSEL: Has the Government rested?

IMMIGRATION JUDGE: On the issue of deportability, yes.

COUNSEL: O.K. I would call the respondent.

IMMIGRATION JUDGE: All right. You may question the respondent.

COUNSEL TO RESPONDENT (through official interpreter):

Q Elias, do you know how to read?

A (not recorded)

Q Have you ever attended school?

A Sometime.

Q Did you finish one year of school?

A No.

Q Do you understand anything at all about your rights as a person in the United States?

A No.

Q When you were in the police station in Pasco, were you advised that you had a right to remain silent?

A (not recorded)

IMMIGRATION JUDGE: Again, please.

A No.

COUNSEL TO RESPONDENT (through official interpreter):

Q Were you advised that anything you might say could and would be used against you in a subsequent proceeding, such as this?

A No.

Q Did your wife attempt to explain to you what your rights were from a piece of paper that the Immigration Officer gave her?

A Yes.

Q Was your wife able to explain that to you?

A But I didn't understand which were the fact.

Q Was your response that "We didn't understand," or that "You didn't understand it?"

A (not recorded)

Q Or was it that "We didn't understand it?"

INTERPRETER: "I didn't understand my way when she explained my rights." That is what he intends to mean.

COUNSEL TO RESPONDENT (through official interpreter):

Q Do you know whether your wife understood what she was trying to explain to you?

A Oh, no.

Q Before the officer asked you a lot of questions to fill out a form, did you indicate that you would like to speak to an attorney?

A Yes.

Q And did he tell you that you could?

A (unintelligible)

Q And then were you in fact given an opportunity to use a telephone?

A (not recorded)

Q Did you ever have a chance to call me before you got out on bail?

A My wife did.

Q But you never did?

A No, I didn't have the chance.

Q And your wife did after she was released from the jail, is that correct?

A Yes.

Q When you were— Were you put into the bathroom at the Rogers plant the day of your arrest?

A Yes.

Q Were you forcibly put into the bathroom?

A Yes.

Q Did an officer take ahold of your body at any time?

A Yes, he grasped me in the back.

COUNSEL: The back of his pants, did he say?

INTERPRETER: Yes.

COUNSEL TO RESPONDENT (through official interpreter):

Q Did he take hold of you anywhere else on your body?

A (not recorded)

COUNSEL: Let the record show that he indicated his right shoulder.

COUNSEL TO RESPONDENT (through official interpreter):

Q Did you understand that at that point you had been detained and were being held in the custody of the Immigration Service?

A Yes, because they locked me up.

Q Were you— What shift were you working at that time?

A Three o'clock.

Q Was this when you left work or began work?

A The time I was beginning to work, I started to work.

Q You were going to work from 3:00 p.m. until 11:30 or so?

A Yes.

Q Were you going into the work area of the plant or coming out of the work area of the plant when the Immigration Officer told you to go into the bathroom?

A I was coming in.

Q Is that coming into the work area or going into the work area?

A Entering the work area.

COUNSEL: Thank you.

COUNSEL TO RESPONDENT (through official interpreter):

Q Were you wearing a helmet, a work helmet, when you were entering?

A Yes.

Q Were you wearing an apron?

A (not recorded)

Q Did you have any face covering at all?

A Yes.

Q Did the Immigration Officer say anything to you in English before telling you to go to the bathroom?

A (not recorded)

Q As you were waiting to enter the work area, did you realize that the Immigration Officers were checking people there?

A No.

Q Did you see this going on?

A No.

Q Did you hear anybody announce that they were Immigration Officers before you were put into the bathroom?

A No.

Q Did you see anybody there in a uniform?

A Yes.

Q Did you think this was an Immigration Officer or a Police Officer?

A Police.

COUNSEL: That is all I have.

IMMIGRATION JUDGE: All right. Mr. Bryant, do you have any questions of this witness, of the respondent?

ACTING TRIAL ATTORNEY: Yes, one question.

ACTING TRIAL ATTORNEY TO RESPONDENT (through official interpreter):

Q Do you recognize Mr. Bower?

IMMIGRATION JUDGE: All right, Transcriber, I am going to change the cassette.

IMMIGRATION JUDGE: —the respondent looked over to the witness, Mr. Bower, and indicated he recognized him. All right, Mr. Bryant.

ACTING TRIAL ATTORNEY TO RESPONDENT (through official interpreter):

Q Did you willingly answer Mr. Bower's questions?

A Yes.

ACTING TRIAL ATTORNEY: No more questions.

COUNSEL TO RESPONDENT (through official interpreter):

Q At the time you say you answered Mr. Bower's questions voluntarily, did you know you had a right not to answer those questions?

A Yes.

Q And knowing you had a right to remain silent, knowing you had a right not to answer any questions, you chose to answer each and every one of Mr. Bower's questions?

A Yes.

Q And how did you learn that you had a right to remain silent?

A (not recorded)

Q But the question was how did you—

IMMIGRATION JUDGE TO RESPONDENT (through official interpreter):

Q How did you find out?

COUNSEL TO RESPONDENT (through official interpreter):

Q Did you in fact know then that you had a right to not answer any questions?

A I don't understand.

IMMIGRATION JUDGE: All right, Counsel, go to something else.

COUNSEL: Well, it is difficult to go to something else when the client doesn't seem to understand.

IMMIGRATION JUDGE: Well, he said he understood he had the right to remain silent. He said that twice. And then on your further examination of him now he doesn't understand. I don't know, but I think we shouldn't keep pounding at the witness. If he doesn't understand, he doesn't understand.

COUNSEL: Your Honor, I have discussed this case thoroughly with Mr. Sandoval and I am firmly convinced he did not understand—

IMMIGRATION JUDGE: All right. Go to something else, Mr. Barr.

COUNSEL: —therefore I am surprised by this testimony and I think it is only that he is at this point not understanding what is being asked of him.

IMMIGRATION JUDGE: All right. I will let you ask one more question, but I'm not going to let you keep asking question after question after question. Now, ask your question. I'm not going to let you make a—

COUNSEL: If I have got to only ask one, I have got to get it just right.

IMMIGRATION JUDGE: All right, get it just right. We will go off the record while you think about it. All right, back on the record. After a lengthy discussion with the respondent, Mr. Barr, are you ready to proceed?

COUNSEL: Yes, your Honor.

COUNSEL TO RESPONDENT (through official interpreter):

Q Did you understand that you did not have to answer Mr. Bower's questions when he asked you the questions there at the jail?

A (unintelligible)

COUNSEL: Thank you. No further questions.

IMMIGRATION JUDGE: Mr. Bryant?

ACTING TRIAL ATTORNEY: No more.

IMMIGRATION JUDGE: All right. Counsel, are you going to apply for voluntary departure in the alternative—

COUNSEL: Yes, your Honor.

IMMIGRATION JUDGE: —because I am going to deny any motion to terminate on this record.

COUNSEL: I would like to argue briefly that motion before—

IMMIGRATION JUDGE: Argue it by brief. Argue it by brief. I have made up my mind I am not going to terminate. If you want to argue it, you can argue it by brief. I am not going to have any argument on this record. All right. You can turn to the issue of voluntary departure now.

COUNSEL TO RESPONDENT (through official interpreter):

Q Mr. Sandoval, we are now at the stage in these proceedings where we are going to ask the Judge to exercise his discretion in your favor and grant you an opportunity to depart the United States voluntarily. In that connection I have to ask you certain questions.

COUNSEL TO INTERPRETER: Would you translate that for us, please.

INTERPRETER: Yes.

COUNSEL TO RESPONDENT (through official interpreter):

Q Mr. Sandoval, you are married?

A Yes.

Q And what is your wife's name?

A Ramona Preciado.

Q Do you have a child born in the United States?

A Yes.

Q When was the child born?

IMMIGRATION JUDGE: Strike the question.

COUNSEL TO RESPONDENT (through official interpreter):

Q Do you have a child that was born this year in the United States?

A (unintelligible)

Q What is the child's name?

A Ramona.

Q And this is a female child?

A Yes.

Q And where was this child born?

A (unintelligible)

Q What is the approximate age of the child now?

A Three months.

Q Has this child been in good health lately?

A No.

Q Was she in poor health at the time that you were detained by the Immigration Service in Pasco?

A Yes.

Q Do you have an appointment in the next few days to have the child examined by her doctor?

A Yes.

Q Do you have relatives besides your citizen child in the United States with whom you could leave the child to be raised while you return to Mexico?

A No.

Q Do you have, if the Judge grants you the opportunity to leave voluntarily, [d]o you have funds, money, sufficient to pay for your transportation and your wife's transportation and your citizen child's transportation to Mexico?

A \$200.

Q Do you think that would be sufficient to get you back to Mexico?

A Yes.

Q If the Judge grants you this, would you depart within the time specified by the Judge?

A Yes.

Q Could you wind up your affairs and make your arrangements to depart and depart within a period of thirty days?

A Yes.

Q Have you ever been arrested for any crime?

A No.

IMMIGRATION JUDGE TO RESPONDENT (through official interpreter):

Q Of what country is your wife a citizen?

A Mexico.

COUNSEL TO RESPONDENT (through official interpreter):

Q Mr. Sandoval, were you detained by the Immigration Service in 1973?

A Yes.

Q And at that time were you permitted to leave voluntarily?

A Yes.

IMMIGRATION JUDGE TO RESPONDENT (through official interpreter):

Q How long did you stay out?

A I came back in 1976.

COUNSEL TO RESPONDENT (through official interpreter):

Q Mr. Sandoval, when you were picked up and given that voluntary departure in 1973, did the Immigration Officer tell you that you couldn't return?

A No.

Q Did they tell you that you couldn't return unless you got a "permiso" of a visa to return?

A No.

Q Why did you come back in 1976?

A (no answer)

IMMIGRATION JUDGE TO RESPONDENT (through official interpreter):

Q When were you married?

A June 26, 1973, 25th, June 25, 1973.

COUNSEL TO RESPONDENT (through official interpreter):

Q Was in Mexico?

A Yes.

IMMIGRATION JUDGE TO RESPONDENT (through official interpreter):

Q When your wife entered, did she enter with you?

A Yes.

COUNSEL: That is all we have, your Honor.

IMMIGRATION JUDGE: All right. Mr. Bryant?

ACTING TRIAL ATTORNEY TO RESPONDENT

(through official interpreter):

Q Do you have a birth certificate for the child, Maria Ramona?

A I have not received it yet.

Q How did you enter the United States the last time?

COUNSEL: That exceeds scope of direct examination.

A I jumped the line.

IMMIGRATION JUDGE: It is a discretionary application. Objection is denied. He has a right to go into—

ACTING TRIAL ATTORNEY TO RESPONDENT

(through official interpreter):

Q The wife came with you this last time?

A Yes.

Q Do you have any other children?

A Yes.

Q Where is the other child?

A Guadalajara.

Q Did you pay a smuggler to assist you to illegally enter the United States this last time?

A (unintelligible)

Q How many times have you been arrested by the Immigration Service?

A Twice.

Q The one time in 1973 and this last time in June?

A Yes.

Q And what is the doctor's name who is attending your child?

A I don't know what his name is because my wife is the one who takes care.

COUNSEL: It is Dr. Cleve Enriquez (phonetic).

ACTING TRIAL ATTORNEY TO RESPONDENT

(through official interpreter):

Q Do you know when your wife took the child to see Dr. Enriquez?

A (not recorded)

IMMIGRATION JUDGE: Again, please.

A I don't know.

ACTING TRIAL ATTORNEY TO RESPONDENT

(through official interpreter):

Q Has she ever taken the child to see Dr. Enriques?

A Yes.

Q When?

A I don't know when because I go to work.

Q You are not even sure then that the child has ever been to the doctor?

A I don't know. She is the one who knows.

Q Do you own a car?

A No.

Q Where are you presently living?

IMMIGRATION JUDGE: The answer was "in Kennewick," Transcriber.

A I don't know the address.

COUNSEL TO INTERPRETER: Did he say that "I just moved there, I don't know what the address is?"

A I moved recently and I don't know the address.

ACTING TRIAL ATTORNEY TO RESPONDENT

(through official interpreter):

Q Do you have any money in the bank?

A No.

Q How much is your rent?

A \$198.

Q And are you presently employed?

A Yes.

Q Where?

A Kennewick.

Q Where?

A Is with a man and I don't know what his name is.

Q What type of work do you do?

A Picking apples.

COUNSEL: Thinning.

INTERPRETER: Thinning apples, I am sorry.

ACTING TRIAL ATTORNEY TO RESPONDENT

(through official interpreter):

Q And how long have you been so employed?

A It was barely started.

Q And how much are you being paid?

A \$1.50 an hour.

Q Is your wife employed?

A Yes.

Q Where?

A With the same person.

IMMIGRATION JUDGE TO RESPONDENT (through official interpreter):

Q Well, if you and your wife are employed, who takes care of the baby?

A We take her to a lady.

Q Who is this lady you take her to?

A I don't know her name.

ACTING TRIAL ATTORNEY: No more questions.

COUNSEL TO RESPONDENT (through official interpreter):

Q Do you pay her for taking care of the child?

A Yes.

Q —what street that lady's home is on?

A Yes.

Q What is it?

A The apartment house where we live.

COUNSEL: Does that help clarify it, Ken?

IMMIGRATION JUDGE: All right, we are going to take a break for lunch. We will reconvene at two o'clock and I will then consider whether I want to give my decision now or wait till later.

IMMIGRATION JUDGE: All right now, after recess for lunch and after I have reviewed my notes, and there are some things I'm not sure of. Therefore, I am going to have it transcribed and enter my decision in due course. Is that understood, Counsel?

COUNSEL: Yes, your Honor. I would like to ask you to reconsider prior motions denied and renew some motions.

IMMIGRATION JUDGE: No. I am not going to reconsider any motions to deny, no. I have made rulings and my decision is the same.

COUNSEL: Well, I'm not sure that I have covered all of the grounds that I wish to adduce in support of those motions.

IMMIGRATION JUDGE: Well, I consider them closed. I am not going to listen to any more motions on your part at this time.

COUNSEL: Leave to make final argument?

IMMIGRATION JUDGE: No. You will argue by brief if you desire to do so.

COUNSEL: Thank you.

IMMIGRATION JUDGE: All right. This hearing is closed.

* * *

I hereby certify that to the best of my knowledge and belief the foregoing pages numbered -1- through -43- are a complete and accurate transcript of the above-described proceedings, except as noted.

/s/____

ARLEAN F. FRAY
Transcriber

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

No.
ORDER TO SHOW CAUSE, NOTICE OF HEARING,
AND WARRANT FOR ARREST OF ALIEN

In Deportation Proceedings under Section 242 of the
Immigration and Nationality Act

UNITED STATES OF AMERICA: File No. A22 346 925

In the Matter of Elias SANDOVAL-Sanchez, Respondent.

Franklin County Jail, 311 W. Agate, Apt. D Pasco, Wa.
Address (number street, city, state, and ZIP code)

UPON inquiry conducted by the Immigration and Naturalization Service, it is alleged that:

1. You are not a citizen or national of the United States;
2. You are a native of Mexico and a citizen of Mexico;
3. You entered the United States near San Ysidro, California on or about June 1976 (date);
4. You were not then inspected by a United States Immigration officer.

AND on the basis of the foregoing allegations, it is charged that you are subject to deportation pursuant to the following provision(s) of law:

Section 241(a)(2) of the Immigration and Nationality Act, in that, you entered the United States without inspection

WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at 815 Airport Way South, Seattle, Washington on July 6th, 1977 at 9:00 am, and show cause why

you should not be deported from the United States on the charge(s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: June 24, 1977
2:25 pm

/s/ Joseph M. During
District Director
Seattle, Washington

Form I-221S (4-1-75)Y

NOTICE TO RESPONDENT

ANY STATEMENT YOU MAKE MAY BE USED
AGAINST YOU IN DEPORTATION PROCEEDINGS

THE COPY OF THIS ORDER SERVED UPON YOU IS
EVIDENCE OF YOUR ALIEN REGISTRATION
WHILE YOU ARE UNDER DEPORTATION
PROCEEDINGS, THE LAW REQUIRES THAT IT BE
CARRIED WITH YOU AT ALL TIMES

If you so choose, you may be represented in this proceeding, at no expense to the Government, by an attorney or other individual authorized and qualified to represent persons before the Immigration and Naturalization Service. You should bring with you any affidavits or other documents which you desire to have considered in connection with your case. If any document is in a foreign language, you should bring the original and certified translation thereof. If you wish to have the testimony of any witness considered, you should arrange to have such witnesses present at the hearing.

At your hearing, you will be given the opportunity to admit or deny any or all of the allegations in the Order to Show Cause and that you are deportable on the charges set forth therein. You will have an opportunity to present evidence on your own behalf, to the receipt of evidence and to cross examine any witnesses presented by the Government. Failure to attend the hearing at the time and place designated hereon may result in a determination being made by the Immigration Judge in your absence.

You will be advised by the Immigration Judge, before whom you appear, of any relief from deportation for which you may appear eligible. You will be given a reasonable opportunity to make any such application to the Immigration Judge.

NOTICE OF CUSTODY DETERMINATION

Pursuant to the authority of Part 242.2, Title 8, Code of Federal Regulations, the authorized officer has determined that pending a final determination of deportability in your case, and, in the event you are ordered deported, until your departure from the United States is effected, but not to exceed six months from the date of the final order of deportation under administrative processes, or from the date of the final order of the court, if judicial review is had, you shall be:

- ☐ Detained in the custody of this Service
- ☒ Released under bond in the amount of \$1,500.00.
- ☐ Released on recognizance.

You may request the Immigration Judge to redetermine this decision.

☐ I do ☐ do not request a redetermination by an Immigration Judge of the custody decision.

REQUEST FOR PROMPT HEARING

To expedite determination of my case, I request an immediate hearing, and waive any right I may have to more extended notice.

(signature of respondent)

(date)

CERTIFICATE OF SERVICE

Served by me at Pasco, Washington on June 24, 1977 at 2:30 p.m.

/s/ Robert J. Keim
(signature and title of employee or officer)

UNITED STATES DEPARTMENT OF JUSTICE
Immigration and Naturalization Service

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ORDER TO SHOW CAUSE, NOTICE OF HEARING, AND WARRANT FOR ARREST OF ALIEN

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WHEREFORE, YOU ARE ORDERED to appear for hearing before an Immigration Judge of the Immigration and Naturalization Service of the United States Department of Justice at 815 Airport Way South, Seattle, Washington on July 6th, 1977 at 9:00 a.m. and show cause why you should not be deported from the United States on the charge (s) set forth above.

WARRANT FOR ARREST OF ALIEN

By virtue of the authority vested in me by the immigration laws of the United States and the regulations issued pursuant thereto, I have commanded that you be taken into custody for proceedings thereafter in accordance with the applicable provisions of the immigration laws and regulations, and this order shall serve as a warrant to any Immigration Officer to take you into custody. The conditions for your detention or release are set on the reverse hereof.

Dated: June 24, 19772:25 PM

Joseph A. Ring
(signature and title of issuing officer)
District Director
Seattle, Washington
(City and State)

MATTER OF SANDOVAL

In Deportation Proceedings

A-20824162

Decided by Board August 20, 1979

- (1) Exclusionary rule is a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect . . ." *United States v. Calandra*, 414 U.S. 338, 348 (1974).
- (2) The United States Supreme Court has never applied the exclusionary rule to exclude evidence from purely civil proceedings.
- (3) The issue of whether the Fourth Amendment exclusionary rule should apply in deportation proceedings must be resolved upon a pragmatic analysis of the purposes underlying the rule, the efficacy of the rule as applied in deportation proceedings to serve its remedial objectives, the societal costs incurred by the exclusion of reliable and probative evidence from deportation proceedings, and the available alternatives to deter unlawful conduct by immigration officers.
- (4) If an immigration officer violates an individual's Fourth Amendment rights during an investigation, the evidence resulting from the violation will be excluded from any subsequent criminal prosecution.
- (5) The application of the exclusionary rule to deportation proceedings would not offer any significant additional disincentive to misconduct on the part of immigration officers.
- (6) The application of the exclusionary rule to deportation proceedings would result in societal costs, which could be avoided if the more direct and timely alternatives, which presently exist, were utilized to curb misconduct by immigration officers.

- (7) When the remote likelihood that the exclusion of evidence seized in violation of an individual's Fourth Amendment rights would significantly affect the conduct of immigration officers is balanced against the societal costs that could arise from such action and the alternatives available to compel respect for constitutional rights, neither legal nor policy considerations dictate the exclusion of such evidence from deportation proceedings.
- (8) Even assuming that the alien's admissions as reflected on the Form I-213 ("Record of Deportable Alien") arose as a result of an unlawful search of her apartment, the Form I-213 was admissible at the deportation proceeding and established her deportability by clear, convincing and unequivocal evidence.

CHARGE:

Order: Act of 1952—Sec. 241(a)(2) [8 U.S.C. 1251(a)(2)]—Entry without inspection

Lodged: Act of 1952—Sec. 241(a)(2) [8 U.S.C. 1251(a)(2)]—In the United States in violation of law having failed to establish the time, place and manner of entry as required under sec. 291, I&N Act 8 U.S.C. 1361)

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BY: Milhollan, Chairman; Maniatis and Maguire, Board Members. Concurring Opinion, Board Member Farb. Dissenting in Part and Concurring in Part Opinion, Board Member Appleman

The respondent appeals from a decision of an immigration judge dated September 30, 1975, finding her deportable as charged and ordering her deportation to Mexico. The appeal will be dismissed. We will, however, grant the respondent voluntary departure under section 244(e) of the Act, 8 U.S.C. 1254(e).

The respondent is a married 36-year-old native and citizen of Mexico. She entered the United States in March 1975. She and her husband crossed the border at night and were not inspected by immigration officers. The couple subsequently made their way to New Rochelle, New York.

On August 6, 1975, the respondent was taken into custody by immigration officers, who located her during a search of the building in which she resided. After being taken to a Service office and advised of her rights, she made a statement admitting her alienage and unlawful entry. She also supplied information resulting in the preparation of Form I-213 ("Record of Deportable Alien").

On that same day, an Order to Show Cause was issued charging the respondent with being deportable under section 241(a)(2) of the Act, 8 U.S.C. 1251(a)(2), as one who entered the United States without inspection.

The deportation hearing was convened on August 22, 1975, and was conducted in several sessions, the last of which was on September 30, 1975. During these proceedings, an additional charge was lodged, alleging the respondent to also be deportable under section 241(a)(2) as one who was unlawfully in this country because she failed to es-

tablish the date, manner, and place of her entry as required under section 291 of the Act, 8 U.S.C. 1361.

By order dated September 30, 1975, the immigration judge found the respondent deportable as charged based on her statement of August 6, 1975, and on an admission made at the hearing that she was an alien followed by her refusal to answer subsequent questions regarding her entry.

Both below and on appeal, the respondent, through counsel, submits that her statement of August 6, 1975, and the resulting Form I-213, should have been suppressed as the "fruit of the poisonous tree"—it being alleged that the search of her apartment (which resulted in her detention) was in violation of the Fourth Amendment of the United States Constitution. It is also submitted that the respondent's admission of alienage before the immigration judge resulted from improper questioning subsequent to her invocation of her Fifth Amendment privilege against self-incrimination and that the admission, therefore, should not have been considered. The respondent further states that the immigration judge's conduct of the hearing evidenced a lack of impartiality and a denial of the respondent's Fifth Amendment due process right to a fair hearing. Finally, it is argued that the immigration judge improperly denied the respondent the privilege of voluntary departure after he refused to let her testify for the limited purpose of supporting her application for that relief.

As regards the evidence of deportability, we agree that the respondent's admission at the hearing concerning her alienage was elicited from her after she was improperly denied her Fifth Amendment privilege against self-incrimination. We will accordingly disregard the respondent's admission in this regard.¹ See *Tashnizi v. INS*, 585

¹ The record suggests that the immigration judge repeatedly questioned the respondent concerning her alienage and directed her to respond to his questioning because she had not personally and expressly invoked her Fifth Amendment privilege regarding that matter. See *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149 (1923); *Lagui v. INS*, 422 F.2d 807 (7 Cir. 1967); *Chavez-Raya v. INS*, 519 F.2d 397 (7 Cir. 1975). Considering the respondent's statement that she did not "like to answer," counsel's explanation that she was in fact invoking the Fifth

F.2d 781 (5 Cir. 1978); *Valeros v. INS*, 387 F.2d 921 (7 Cir. 1967); *Estes v. Potter*, 183 F.2d 865 (5 Cir. 1950), *cert. denied*, 340 U.S. 920 (1951); *Matter of R—*, 4 I&N Dec. 720 (BIA 1952). See also section 275 of the Act, 8 U.S.C. 1325.

In view of this finding, the sole evidence of record regarding deportability is that which the respondent alleges resulted from an unlawful search of her dwelling and which she submits should have been excluded from the proceedings below.

The facts of this case relating to the challenged search were not clearly developed in the 68-page record. Apparently, however, the respondent and her husband shared the third floor of a 3-story house with 2 other men and one of the men's children (some or all of these persons were related). The ground level apartment in the house belonged to the building's "caretaker" and was accessible by its own exterior door. The upper 2 stories were accessible by one outside entrance. This outside door was always kept locked and each of the tenants and the caretaker had a key. An inside stairway led from the second floor to the third floor, where the respondent resided. There was a door leading to the third floor of the house, which was kept closed, but which had no lock. There was no testimony as to whether the exterior of this door reflected that it led to a separate apartment.

According to the testimony of one of the inhabitants of the third floor of the house, at 6:00 a.m. on the morning of August 6, 1975, he received a telephone call warning him that immigration officers were coming. Approximately 15 minutes later he saw immigration officers outside the house. He did not hear the house bell ring or hear a knock, but assumed the caretaker let the officers into the locked

Amendment privilege, and the language barrier arising from a non-English speaking witness testifying through a translator, we are satisfied that the privilege had been invoked as to the question of alienage and that the subsequent directions to respondent to that question were improper. Cf. *U.S. ex rel. Vajtauer v. Commissioner of Immigration*, 273 U.S. 103, 113 (1927) (regarding privilege being "fairly brought to the attention of the tribunal which must pass upon it").

building. Shortly thereafter, two immigration officers opened the door to the third floor area of the house, entered partially, knocked after they had stepped inside, and then searched the apartment.² The respondent's witness testified that no consent was given to search. The Service concedes that the investigators had no warrant. The immigration judge did not require either investigator to testify at the hearing.

The respondent and her husband were subsequently taken into custody and transported to a Service office, apparently after admitting their unlawful status. At 2:15 p.m. that same day, after being advised of her rights, the respondent signed an affidavit, admitting her alienage and her illegal entry into this country. It is this statement and the I-213 prepared in conjunction with it that the respondent urges must be excluded from evidence as the product of an illegal search. See *Wong Sun v. United States*, 371 U.S. 471 (1963) (regarding the suppression of verbal statements). Exclusion is argued solely on Fourth Amendment grounds, as the respondent makes no claim on appeal that her statement was either involuntary or otherwise inadmissible.

On these facts, if we assume that evidence unlawfully seized by immigration officers must be excluded from deportation proceedings, we would find that the respondent had come forward with sufficient proof to establish a prima facie case of illegality so as to require the Service either to assume the burden of justifying the manner which it obtained entry to the respondent's apartment or to establish that the connection between the search and the resulting statement and Form I-213 had become sufficiently attenuated to dissipate any "taint." See *Brown v. Illinois*, 422 U.S. 590 (1975); *Nardone v. United States*, 308 U.S. 338, 341 (1939); *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971). See also *United States v. Karathanos*, 531 F.2d 26, 34-35 (2

² On appeal, the respondent states, through counsel (Brief on Appeal, at page 4), that the 2 investigators, "wielding flashlights, burst through the front door of the apartment." Neither the testimony of the respondent's witness nor her own affidavit, however, supports this characterization of the agents' entry.

Cir. 1976), *cert. denied*, 428 U.S. 910 (1976). As that burden was not placed on the Service and as evidence justifying the search is not in evidence, we are faced with the issue of whether the exclusionary rule should be held applicable in deportation proceedings.³

A preliminary question in this regard is whether unlawfully seized evidence has previously been held excludable from deportation proceedings. Two early district court decisions⁴ ordered the exclusion of such evidence and the Supreme Court in *dicta* in *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923) stated that "it could be assumed that evidence obtained by the Department [of Labor] through an illegal search and seizure cannot be the basis of a finding in deportation." A leading immigration law treatise states that:

It is undisputed . . . that the Fourth Amendment's prohibition against unreasonable searches and seizures applies in deportation proceedings, and that evidence obtained as the result of an unlawful search cannot be used.⁵

Thus, one might assume that the issue has long been resolved.

During the initial 55 years following the *Bilokumsky* decision, however, we find no Federal Court decision either holding that evidence obtained through an unlawful search would be inadmissible in deportation proceedings or in fact excluding any such evidence. Moreover, the Board has never specifically reached this issue. Many decisions do exist in

³ By memorandum, dated October 4, 1978, the General Counsel of the Service states that the Service position is that the exclusionary rule is inapplicable in civil deportation proceedings.

⁴ *Ex parte Jackson*, 263 F. 110 (D. Mont. 1920), *appeal dismissed*, *sub nom. Andrews v. Jackson*, 267 F. 1022 (9 Cir. 1920); *United States v. Wong Quong Wong*, 94 F. 832 (D. Vt. 1899).

⁵ Gordon and Rosenfield, *Immigration Law and Procedure* (Revised Edition 1977), at 5-31. No case cited in support of this principle, however, includes a holding in this regard or resulted in any exclusion of evidence from a deportation proceeding. See *Klissas v. INS*, 361 F.2d 529 (D.C. Cir. 1966); *United States v. Montes-Hernandez*, 291 F.Supp. 712 (E.D. Cal. 1968); *Roa-Rodriguez v. INS*, 410 F.2d 1206 (10 Cir. 1969).

which the merits of a challenge to a contested search were addressed,⁶ but over the cited period all reported cases were resolved in the Government's favor, thus obviating the need to specifically reach the question now under consideration. This wealth of cases can be read either as assuming the excludability of unlawfully seized evidence or as declining to address that fundamental issue where not essential to do so.⁷ In either case, however, during this 55-year period neither the Board nor any Federal Court either ordered the exclusion of any unlawfully seized evidence or reached the issue of whether such evidence should in fact be excluded from deportation proceedings.

Remarkably, not until 1977 do we find a Circuit Court decision specifically addressing the question. That year, the First Circuit Court of Appeals in *Wong Chung Che v. INS*, 565 F.2d 166 (1 Cir. 1977), held that the product of an unlawful search would be inadmissible in deportation proceedings. That decision, however, was based in large part on what was viewed as the long history of "assumed" inadmissibility rather than on a detailed analysis of the relative merits of excluding such evidence from deportation proceedings. Compare *Smith v. Morris*, 442 F.Supp. 712 (E.D. Pa. 1977), appeal dismissed on other grounds sub nom. *Smith v. INS*, 585 F.2d 600 (3 Cir. 1978) (exclusionary rule not applicable to deportation proceeding in which

⁶ See *Hoonsilapa v. INS*, 575 F.2d 735 (9 Cir. 1978); *Cordon de Ruano v. INS*, 554 F.2d 944 (9 Cir. 1977); *Aguirre v. INS*, 553 F.2d 501 (5 Cir. 1977); *Ho Chong Tsao v. INS*, 538 F.2d 667 (5 Cir. 1976), cert. denied, 430 U.S. 906 (1977); *Vlissidis v. Anadell*, 262 F.2d 298 (7 Cir. 1959); *Matter of Gonzalez*, Interim Decision 2536 (BIA 1976); *Matter of Burgos*, 15 I&N Dec. 278 (BIA 1975); *Matter of Scavo*, 14 I&N Dec. 326 (BIA 1973); *Matter of Tsang*, 14 I&N Dec. 294 (BIA 1973); *Matter of Wong*, 13 I&N Dec. 820 (1971); *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971); *Matter of Au, Yim and Lam*, 13 I&N Dec. 294 (BIA 1969); *Matter of Doo*, 13 I&N Dec. 30 (BIA 1968); *Matter of Chen*, 12 I&N Dec. 603 (BIA 1968); *Matter of D—M—*, 6 I&N Dec. 726 (BIA 1955).

⁷ This Board has not previously intended to reach the issue decided today and withdraws from any language which may be read as suggesting otherwise. See also *Lee v. INS*, No. 77-2265 (3 Cir. filed Jan. 4, 1979); *Cuevas-Ortega v. INS*, No. 77-1630 (9 Cir. filed Jan. 2, 1979).

decision did not depend upon proof of specific events, but merely on proof of status).

Accordingly, as the Board has not previously resolved this issue, as we find only one contemporary Federal Court decision in which unlawfully seized evidence is specifically held to be excludable, and as we find no decision in which the appropriateness of applying the rule in deportation proceedings is analyzed in any detail, we will address the question as one of first impression.

The initial issue is whether relevant Supreme Court precedent mandates the conclusion that all unlawfully obtained evidence be excluded from civil deportation proceedings *without* further inquiry into the necessity, usefulness, and effect of the exclusion of such evidence within the context of immigration law. We find this not to be the case.

The exclusionary rule is "a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect. . . ." *United States v. Calandra*, 414 U.S. 338, 348 (1974). The Supreme Court has found that the "need for deterrence and hence the rationale for excluding evidence are strongest where the Government's unlawful conduct would result in the imposition of a criminal sanction on the victim of the search." (Emphasis supplied.) *Calandra* at 338. Thus, in certain criminal proceedings, the Court has assumed the necessity and efficacy of the "drastic measure" of excluding evidence as a means of deterring law enforcement officials from violating Fourth Amendment rights. See *United States v. Janis*, 428 U.S. 433, 459 (1976).

The Supreme Court, however, has "never . . . applied [the exclusionary rule] to exclude evidence from a civil proceeding, federal or state." *United States v. Janis* at 447.⁸ The Court in *Janis* did reference the "seminal" lower court decisions that had applied the exclusionary rule to civil proceedings involving "intrasovereign" Fourth Amendment vi-

⁸ See *Janis* at 447 n. 17, regarding the exclusion of evidence from 2 proceedings which were in "substance" and "effect" criminal (i.e., proceedings the subject of which were to "penalize for the commission of an offense against the law." *Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965)).

olations, but expressly did not consider that situation. *Janis* at 456. In the same decision, the Court also noted without adverse comment that in "some cases the courts have refused to create an exclusionary rule for either intersovereign or intrasovereign violations in proceedings other than strictly criminal prosecutions."⁹ Thus, it is not entirely clear that the Court would extend the exclusionary rule to exclude evidence in any civil proceeding. See *Todd Shipyards Corp. v. Secretary of Labor*, 586 F.2d 683, 689 (9 Cir. 1978) (questioning applicability of rule in OSHA proceedings). We are convinced, however, that if the rule were to be extended to apply in a given civil proceeding, the Court would only do so after balancing the likelihood of deterring misconduct by government officials against the societal costs imposed by rendering unavailable clearly probative and reliable evidence.¹⁰

Although deportation is a drastic measure and at times "the equivalent of banishment or exile,"¹¹ it has consistently been classified as a civil rather than a criminal procedure.¹² For this reason, every court of appeals that has

⁹ *Janis* at 456. We note in this regard that all of the numerous reported cases which have considered the question have held the exclusionary rule inapplicable to probation revocation proceedings. See *United States v. Frederickson*, 581 F.2d 711, 713 (8 Cir. 1978) and the cases cited therein. See also *U.S. ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2 Cir. 1970) (rule not applied in parole revocation proceedings).

¹⁰ See *Stone v. Powell*, 428 U.S. 465, 488 (1976); *United States v. Janis*, *supra* at 447-460 (1976); *United States v. Calandra*, 414 U.S. 338, 349 (1974).

¹¹ *Delgadillo v. Carmichael*, 332 U.S. 388, 391 (1947).

¹² *Wee Woodby v. INS*, 385 U.S. 276, 285 (1966); *Harisiades v. Shaughnessy*, 342 U.S. 580, 594 (1952); *Ramirez v. INS*, 550 F.2d 560, 563 (9 Cir. 1977); *LeTourneur v. INS*, 538 F.2d 1368, 1370 (9 Cir. 1976), *cert. denied*, 429 U.S. 1044 (1977); *Nai Cheng Chen v. INS*, 537 F.2d 566 (1 Cir. 1976); *Avila-Gallegos v. INS*, 441 F.2d 1245 (5 Cir. 1971), *cert. denied*, 404 U.S. 946 (1971). See also *Abel v. United States*, 362 U.S. 217, 237 (1960):

According to the uniform decisions of this Court, deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions. Searches for evidence of crime present situations demanding the greatest, nor the least, restraint upon the

considered the issue has held that the absence of *Miranda* warnings does not render an otherwise voluntary statement inadmissible in a deportation case. See *Navia-Duran v. INS*, 568 F.2d 803, 808 (5 Cir. 1977); *Trias-Hernandez v. INS*, 528 F.2d 366, 368 (9 Cir. 1975); *Anila-Gallegos v. INS*, 525 F.2d 666, 667 (2 Cir. 1975); *Chavez-Raya v. INS*, 519 F.2d 397, 399-401 (7 Cir. 1975). Accordingly, we find no clear mandate to extend the Fourth Amendment exclusionary rule to apply in deportation proceedings without a further inquiry into the appropriateness of doing so. Instead, we find that this issue must be resolved only upon a "pragmatic analysis"¹³ of the purposes underlying the exclusionary rule, the efficacy of the rule as applied in deportation proceedings to serve its remedial objectives, the societal costs incurred by the exclusion of reliable and relevant evidence from deportation proceedings, and the available alternatives to deter unlawful conduct by immigration officers.

The Supreme Court has held that the prime, if not sole, purpose of the exclusionary rule is to deter future unlawful police conduct. *United States v. Janis*, *supra* at 446; *United States v. Calandra*, *supra* at 347. It is well-settled that the rule is not calculated to "redress the injury into the privacy of the search victim."¹⁴ and there would appear little support for the view that application of the rule is essential for the purposes of "judicial integrity."¹⁵ Further, the rule's ultimate purpose is not to punish the Government for the wrongful acts of its agents. Thus, at a minimum, it would appear essential to a decision to apply the rule in deportation proceedings that we find that such application

Government's intrusion into privacy; although its protection is not limited to them, it was at these searches which the Fourth Amendment was primarily directed.

¹³ *Stone v. Powell*, *supra* at 488.

¹⁴ *United States v. Calandra*, *supra* at 347.

¹⁵ *Stone v. Powell*, *supra* at 499 (1976) (Burger, C.J., concurring); *United States v. Janis*, *supra* at 457.

would have some meaningful effect on the future conduct or misconduct of immigration officers.¹⁶

We initially note in this regard that immigration officers are charged with investigating both civil and criminal violations of the immigration laws. *See, for example*, sections 242(d) and (e), 252(c), 264(e), 266, and 274-278 of the Act, 8 U.S.C. 1252(d) and (e), 1282(c), 1304(e), 1306, 1324-1328 (criminal violations under Service jurisdiction). The criminal and civil investigations are routinely performed concurrently because an officer who suspects an individual of being unlawfully present in the United States will not ordinarily know in advance whether or not the individual may also have violated a criminal provision of the immigration laws. If an immigration officer violates an alien's rights under the Fourth Amendment during such an investigation, he knows that evidence resulting from that violation will be excluded from any subsequent criminal prosecution. *See United States v. Martinez-Fuerte*, 428 U.S. 543 (1976); *United States v. Brignoni-Ponce*, 422 U.S. 873 (1975); *United States v. Karathanos*, *supra*. Thus, if one starts with the premise that the exclusionary rule is an effective tool of deterrence, the question now before us is whether any *additional* significant deterrent effect would be served by ruling that such evidence should also be excluded from the related civil deportation proceeding.

At first appearance, it might seem that the deterrent effect on immigration officers of excluding unlawfully seized evidence from deportation proceedings could still be equated to the presumed effect on law enforcement officials of excluding such evidence from criminal proceedings. In both instances the evidence would be made unavailable in the proceedings that fall within the officers' "zone of primary interest."¹⁷ The fact that deportation proceedings are

¹⁶ We limit our inquiry here to the question relating to the exclusion of evidence unlawfully seized by immigration officers. However, we find significant support in *Janis* for the conclusion that evidence unlawfully seized by federal and state police officers in pursuance of criminal investigations should not be excluded from deportation hearings (collateral, civil proceedings).

¹⁷ *Janis* at 458.

civil in nature, however, creates further distinctions which make this comparison inapposite.

First, although there is no convincing empirical evidence that the exclusionary rule has operated to deter violations of Fourth Amendment rights by law enforcement officials, the Supreme Court has been willing to apply that "drastic measure" in various criminal settings based on its "own assumptions of human nature and the interrelationship of the various components of the law enforcement system." *United States v. Janis*, *supra* at 459. This willingness arises in part because the rationale for excluding evidence is strongest where criminal sanctions can result and because it was searches for evidence of crime to which the Fourth Amendment was primarily directed. In view of the absence of these factors in the civil setting, we are not convinced that the Court would "assume" the efficacy of the exclusionary rule as a meaningful tool of deterrence if applied in deportation proceedings.

Secondly, the civil nature of deportation proceedings creates a clear impact on the rule's potential effectiveness to deter future misconduct by immigration officers, even if it were extended so as to require the exclusion of unlawfully seized evidence in those proceedings. A significant number of deportation cases involve solely the question of a respondent's *present status*, as distinguished from criminal proceedings where the issues generally relate to a defendant's *past actions*. See *Smith v. Morris*, *supra*. In fact, in many deportation cases the sole matters necessary for the Government to establish are the respondent's identity and alienage—at which point the burden shifts to the respondent to prove the time, place and manner of entry. See section 291 of the Act. It is also true, in view of the civil nature of these proceedings, that the "body" or identity of an alien (as distinguished from alienage) is not suppressible as the "fruit of the poisonous tree" even if it is conceded that an illegal arrest, search, or interrogation occurred. See *Hoonsilapa v. INS*, *supra* at 738; *Wong Chung Che v. INS*, *supra* at 168; *Katris v. INS*, 562 F.2d 866, 869 (2 Cir. 1977); *Avila-Gallegos v. INS*, *supra* at 667; *Guzman-Flores v. INS*, 496 F.2d 1245, 1247-48 (7 Cir. 1974);

Huerta-Cabrera v. INS, 466 F.2d 759, 761 n. 5 (7 Cir. 1972); *La Franca v. INS*, 413 F.2d 686, 689 (2 Cir. 1969). Once an alien's identity is learned, the Service can entirely avoid triggering the exclusionary rule in all cases where documents lawfully in the Service's possession evidence unlawful presence.

Accordingly, even if one presumes the existence of an immigration officer who would intentionally elect either to violate or not to violate an individual's Fourth Amendment rights based on whether his wrongful actions could result in evidence available for use in deportation proceedings, it is not clear that the application of the exclusionary rule would significantly impact on that officer's judgment because what is often the most damaging evidence resulting from an illegal search (the alien's "body") cannot be suppressed.¹⁸ Thus, even if the exclusionary rule were applied in deportation proceedings, a presumed unscrupulous immigration officer would not be assured *prior* to his unlawful act that he would not be "rewarded" with damaging evidence which could result in an alien's deportation.¹⁹ This Board is, therefore, not convinced that the adoption of the exclusionary rule in deportation proceedings would offer any significant additional deterrent to misconduct to an immigration officer who would otherwise intentionally choose to violate an individual's Fourth Amendment rights in hopes of assisting in the alien's deportation.²⁰

¹⁸ By this analysis, we of course do not sanction any hypothetical misconduct. It is solely intended to illustrate the limitations of excluding evidence from deportation proceedings as a meaningful deterrent to immigration officers.

¹⁹ Under these circumstances, only where the officer knew *prior* to the search that the individual was one for whom the Service had no records (*e.g.*, an alien who entered without inspection) or that the Service records alone could not result in a finding of deportability, could now even assume that the incentive for misconduct could be affected.

²⁰ See, Austin T. Fragonan, Jr., *Procedural Aspects of Illegal Aspects of Illegal Search and Seizure in Deportation Cases*, San Diego Law Review, Vol. 14, No. 1, Dec. 1976, at pp. 181-182, regarding impact of exclusionary rule as a deterrent to misconduct by immigration officer under present statutory and case law.

Against this somewhat questionable role as a tool of deterrence, one must consider the "societal costs" imposed by application of the rule. It might be presumed that these "costs" would be minimal in view of the fact that since 1899 we can find only two reported cases in which unlawfully seized evidence was in fact excluded from deportation proceedings and only one other case in which the applicability of rule was specifically addressed. Under such circumstances (even if one assumes that the Service may have elected not to issue Orders to Show Cause in some cases for fear that critical evidence might be found inadmissible), the rule would not appear to have the potential to significantly impact on this country's immigration laws and policies.

There are, however, "costs" which arise even when evidence is not ultimately excluded. Absent the applicability of the exclusionary rule, questions relating to deportability routinely involve simple factual allegations and matters of proof.²¹ When Fourth Amendment issues are raised at deportation hearings, the result is a diversion of attention from the main issues which those proceedings were created to resolve, both in terms of the expertise of the administrative decision makers and of the structure of the forum to accommodate inquiries into search and seizure questions. The results frequently seems to be a long, confused record in which the issues are not clearly defined and in which there is voluminous testimony, but the underlying facts not sufficiently developed. The ensuing delays and inordinant amount of time spent on such cases at all levels has an adverse impact on the effective administration of the immigration laws, which to date (in view of the virtual absence of cases in which evidence has been ultimately excluded) has in no way been counterbalanced by any apparent productive result. This burden on the "system" is certainly not a basis in itself to conclude that such issues are not appropriate in deportation proceedings, but we think this effect is a relevant consideration when balancing competing inter-

²¹ Presently, in the majority of cases, deportability is conceded and the bulk of the hearing concerns applications for various categories of mandatory or discretionary relief from deportation.

ests and one which cannot be characterized as "trivial." See *Franks v. Delaware*, 98 S.Ct. 2674, 2682-2683 (1978). This is particularly true in a proceeding where delay may be the only "defense" available and where problems already exist with the use of dilatory tactics. See, e.g., *Vasquez-Contreras v. INS*, 582 F.2d 334 (5 Cir. 1978); *Der-Rong Chour v. INS*, 578 F.2d 464 (2 Cir. 1978); *Ballenilla-Gonzalez v. INS*, 546 F.2d 515 (2 Cir. 1976), *cert. denied*, 434 U.S. 819 (1976); *Bufalino v. INS*, 473 F.2d 728 (3 Cir. 1973), *cert. denied*, 412 U.S. 928 (1973).

Other "societal costs" would arise in any case where the rule operated to preclude the deportation of an alien whose presence in "this country was not lawful. We do not suggest that the "cost" of an alien's continued unlawful presence is in any way comparable to the "cost" of allowing a criminal to go free; the differences are of kind, rather than degree. A criminal may be given immunity for past conduct, but is never licensed to commit future crimes. However, where an alien whose status is not lawful is saved from deportation through the operation of the exclusionary rule, the result would be a sanctioning of a continuing violation of this country's immigration laws.

As a final consideration in this regard, we think it possible that the availability of the exclusionary rule in deportation proceedings would make it less likely that aliens and their counsel would pursue more direct and timely approaches to curbing violations of Fourth Amendment rights by immigration officers. It is not unreasonable to assume that an alien will be primarily concerned with his or her own status, and only secondarily concerned with the future actions of immigration officers. Thus, even though the suppression of evidence may be the most cumbersome and unproven tool of deterrence, it is the approach most likely to be pursued by an alien whose Fourth Amendment rights have been violated because of its "windfall" effect.

This last consideration is relevant only if other alternatives exist with respect to curbing such misconduct by immigration officers, but we find that alternatives are available. The most direct initial action that one can take when there is misconduct by an immigration officer is a formal

complaint to his or her superior; in most instances relating to unlawful searches, the District Director. *See* 8 C.F.R. 100.2 *See also* Operations Instruction 287.10, March 15, 1978 ("The Service Professional Integrity Program"). There is no evidence suggesting that the Service is not responsive to complaints regarding employee misconduct. Such an approach provides no "windfall" to the alien, and offers significant advantages over the exclusionary rule in preventing subsequent misconduct. First, the action is direct and timely. It can follow immediately after the alleged misconduct and the complaint can be directed to the official responsible for supervising the day-to-day actions of the officer or officers in question. This approach does not rely on any presumption (which we think unfounded) that the officer will tailor his or her conduct based on an administrative or judicial decision that may come months or even years after the contested action, particularly when it is in no way clear that officers are even aware of the ultimate disposition of the cases in which there are involved. Moreover, this approach has the benefit of forcing supervisory personnel to confront the issues and to clarify policies relating to searches and seizures. Where misconduct is determined to have occurred, the impact on the responsible officer can be significant, direct, and incapable of being ignored (*e.g.*, a fine, suspension, or dismissal). Equally as important, where improper actions are taken by an officer in good faith, education and training can be substituted for punishment.

We note in this regard that we are not dealing with a diverse group of law enforcement agencies responsible to various federal or state authorities. We are concerned with one federal agency and its officers, who are responsible to one agency Commissioner, and in turn ultimately responsible to the Attorney General of the United States. We are not satisfied—and have not been shown—that misconduct by service officers relating to violations of individuals' Fourth Amendment rights cannot be adequately addressed within this forum.

Secondly, where the violations stem from unlawful Service policies rather than from individual misconduct, such

policies regarding searches can be challenged in the Federal Courts by injunctive or mandamus actions—actions specifically designed to deter future misdeeds, rather than to punish for past conduct. See *Loya v. INS*, 583 F.2d 1110 (9 Cir. 1978); *LaDuke v. Castillo*, 455 F.Supp. 209 (E.D. Wash. 1978); *Marques v. Kiley*, 436 F.Supp. 100 (S.D.N.Y. 1977); *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (7 Cir. 1976), *modified en banc*, 548 F.2d 715 (7 Cir. 1977). These actions also directly impact on the perceived problem, rather than relying on any hope that an officer's conduct will be affected by the result of a subsequent proceeding in which he is neither a party nor (if we presume malevolence) much concerned.²²

Finally, civil or criminal actions against the individual officer may be available. See *Bivens v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971). See also *U.S. ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161, 1164 (2 Cir. 1970); 18 U.S.C. 2234-2236.

We recognize the fundamental right of all persons in this country to privacy free from unreasonable state intrusion. We are sensitive to the fact that many persons journey to this country—at times at great personal sacrifice—in order to live in a society in which constitutional guarantees are meaningfully enforced. We simply are not convinced, however, that the exclusion of unlawfully seized evidence from deportation proceedings would in fact affect the conduct of any immigration officer who would otherwise malevolently violate individual rights.

Accordingly, when we balance what we consider to be the remote likelihood that the exclusion of unlawfully seized evidence from deportation proceedings would significantly affect the conduct of immigration officers with the societal costs that could result from such action and the alternatives available to compel respect for constitutional rights, we are not satisfied that either legal or policy considerations dictate the exclusion of unlawfully seized evidence from these

²² *United States v. Janis*, 428 U.S. at 448 n. 20.

proceedings.²³ In view of the foregoing, we find that the respondent's statement of August 6, 1975, and the Form I-213 were admissible in the proceedings below and that deportability under section 241(a)(2) of the Act was established by clear, convincing and unequivocal evidence.

Regarding the claim that the immigration judge was biased, disrespectful, and incompetent, we find that the respondent's contentions are not supported in the record. We do not agree that alleged errors in rulings and that which counsel perceives as "silly procedural technicalities" indicate either prejudice or incompetence requiring new proceedings before a different immigration judge. The record is at times confused and also suggestive of a strained relationship between the immigration judge and the respondent's three counsel (particularly on the part of counsel), but we find no manifestation of any "bias" on the part of the immigration judge as regards the respondent nor any impermissible restraint on counsel's representation of their client. We note that the immigration judge made various rulings in the respondent's favor, in fact elicited from the Service the fact that no warrant had been used for the search in question, granted frequent recesses to the respondent to confer with her attorneys, accommodated every rescheduling request made by the respondent's counsel, and ultimately adjourned the proceedings and withheld his decision pending submission by the respondent's counsel of a brief in support of their motion. Our review of the record does not reveal "flagrantly injudicious conduct" (as submitted by counsel) resulting in a denial to the respondent of a fundamentally fair hearing.²⁴

²³ Our decision in this regard, of course, does not affect the inadmissibility of evidence obtained in violation of a respondent's privilege against self-incrimination or of statements or admissions that are involuntary or coerced. See *Tashnizi v. INS*, *supra*; *Valeros v. INS*, *supra*; *Navia-Duran v. INS*, 568 F.2d 803 (1 Cir. 1977); *Bong Youn Choy v. Barber*, 279 F.2d 642 (9 Cir. 1960).

²⁴ It is submitted that the immigration judge was abusive and "shouted" during the proceedings; however, in response to a complaint in this regard he advised counsel that he was not raising his voice, but that it was his normal voice level and he wanted counsel to keep his "voice up." The record in fact reflects that on numerous occasions the

Finally, the respondent challenges the denial of voluntary departure. We are satisfied that she should, as a matter of discretion, be granted that privilege. The parties at the hearing appear to have been unclear as to the meaning of the regulatory language in 8 C.F.R. 242.17(d). In *Matter of Bulos*, 15 I&N Dec. 645 (BIA 1976), decided after the immigration judge's decision appealed from herein, we clarified that the testimony given in support of an application for voluntary departure may not be relied upon to base a finding of deportability. Considering that there appears little doubt as to the respondent's good moral character and in view of the understandable uncertainty at the hearing as to the advisability of answering all questions, we will grant to the respondent the privilege of voluntary departure.

The appeal will accordingly be sustained as to the denial of voluntary departure, and dismissed in all other regards.

ORDER: The appeal is dismissed, except as regards the denial of voluntary departure.

FURTHER ORDER: The outstanding order of deportation is withdrawn, and in lieu of an order of deportation the respondent is allowed to depart voluntarily, without expense to the Government, within 30 days from the date of this order or any extension beyond that time as may be granted by the District Director and under such conditions as he may direct. In the event of the respondent's failure so to depart, the order of deportation will be reinstated.

immigration judge found it necessary to instruct the parties, including the Service's witness, to speak louder. It is also submitted on appeal that the immigration judge engaged in an improper *ex parte* conference with the trial attorney, a Service witness and the Chief Special Inquiry Officer. The record indicates, however, that at the September 9, 1975, hearing the respondent's counsel stated only that it "appeared" to her that a conversation had occurred (the substance of which she did not know) during the course of the previous hearing when she and the respondent were conferring outside the hearing room. The immigration judge indicated that no conversation regarding the proceedings had occurred and, on this record, we find neither material error nor a need to pursue the matter.

CONCURRING OPINION: Ralph Farb, Board Member

The exclusionary rule is not applicable to deportation hearings, nor should it be.

Decision writers and commentators who assume its applicability have failed to discuss it deeply. It is as if it was casually assumed that, because the Fifth Amendment's self-incrimination clause applies and is operative to bar the use of involuntary statements, the same result must follow from violation of the search and seizure clause of the nearby Fourth Amendment. That the two are not analogous is easily demonstrated.

The very words of the Fifth Amendment, prohibiting the use of enforced self-incriminating statements in criminal trials, underlie the extension of the bar to civil and administrative proceedings where the Government is the adverse party. Moreover, such statements are suspect as to reliability and probative value.

By contrast, the Fourth Amendment in itself says nothing about use of illegally seized evidence. The exclusionary rule is not a personal constitutional right of an aggrieved party, it has never been interpreted as applying to all types of proceedings and it is not intended to give redress to the aggrieved party.

The deportation hearing process has never been linked to formal rules of evidence. Evidence which would be inadmissible in a courtroom may be received; if it is probative it may be relied upon to establish a fact. This is consonant with the overall approach to this type of administrative decision making. Neither illegality in the arrest nor irregularity in the contents of the initiating document necessarily stands in the way of a deportability.

For Fiscal Year 1977, the Immigration and Naturalization Service reported that it had located 1,042,000 deportable aliens. Of these, 939,000, or 90%, were listed as having entered without inspection. That means that for the vast majority there was no reason to expect that the Immigration and Naturalization Service records contained prior evidence of their identity as aliens. I am not condoning or encouraging violation of Fourth Amendment rights in the immigration investigator's search for solid

proof of identity. If it were done deliberately, discharge from Government service would be appropriate. I simply don't see how we can reasonably bar the use of illegally obtained convincing proof that a person is an alien with no right of presence, when that may be all that will ever be available to identify him. It would be inconsistent with the manifest intention of Congress that the Immigration and Naturalization Service know the location of every alien in the country.

The Board's decision attempts to draw a distinction between immigration investigators and other types of law enforcement officers as to the hypothetical deterrent effect which might result from the imposition of the exclusionary rule on deportation hearings. I will have none of it. There is no reliable evidence of the effect of the exclusionary rule on conduct of police officers generally, and it is merely fanciful to make comparisons based on the supposed deliberate conduct of knowledgeable officers. Most violations of civil rights result either from ignorance or from excess of zeal. The calculating, unscrupulous officer belongs to fiction, not reality. Despite my reservation in this one regard I agree with the decision.

DISSENTING IN PART AND CONCURRING IN PART: Irving A. Applemen, Board Member

Interim Decision #2725

I concur only in the result reached in this case by the majority decision, not in its rationale. My divergence with my colleagues is threefold: (1) Even assuming an unlawful arrest, the Service evidence in this case is admissible and alienage and deportability have been established by clear and convincing evidence, without any necessity for reaching the issue of applicability of the exclusionary rule; (2) Assuming any necessity for examining the arrest, the evidence respecting the claimed illegality is unsatisfactory in crucial areas, and a reopening of the proceedings is required before the applicability of the Fourth Amendment can be discussed, to determine if an issue actually exists; (3) Assuming *arguendo* the necessity for, and propriety of, reaching the issue, the exclusionary rule is applicable in deportation proceedings.

I

The Government's case rests on a Form I-213 (Record of Deportable Alien), an Affidavit signed by the alien, a Form I-214 (Advice of Rights), and the testimony of Investigator DiPlacidi.

DiPlacidi was responsible for the execution of these documents at the Immigration and Naturalization Service office. He was not the arresting officer. His initial action was to fully advise the respondent of her rights in her own language. The Affidavit (Exhibit 2) was taken from her in Spanish, written down in English and read back to her in Spanish. The Form I-213 (Exhibit 3) was filled out from information partly known to the investigator and partly furnished by the respondent. The Form I-214 is part of Exhibit 2 and notes the time of execution as 2:15 p.m., on the day of the arrest and the place as 20 West Broadway, New York City.¹ The Form I-213 and the affidavit state that the

¹ This is the location of the New York office of the Immigration and Naturalization Service.

respondent is a native and national of Mexico who entered the United States without inspection in March 1975.

The I-213 shows that the alien was apprehended at her residence on August 6, 1975 at 6:30 a.m. during a "field investigation." The *Affidavit* recites that it was taken in Spanish by Investigator DiPlacidi, that he identified himself as an officer of the United States Immigration and Naturalization Service and informed her that he desired to take her sworn statement regarding her illegal entry into the United States. It contains warnings as to her right to remain silent; that anything she said might be used against her in a court or in an immigration or administrative proceeding; that she had the right to talk to a lawyer for advice during questioning; that if she could not afford a lawyer one would be appointed for her; that she had the right to stop answering questions at any time.

According to DiPlacidi, these warnings were given to her in Spanish and she fully understood them. Included in the preliminary warnings, is the statement "I am willing to make a statement without anyone else being present." Her signature appears on both pages. The warnings and statement of rights on the attached I-214 are also in the Spanish language, and are equally complete. The form concludes in substance, "I understand my rights, I am ready to make a declaration and answer questions, for now I do not desire a lawyer. I understand and know what I am doing. I have not been made any promises nor have I been threatened, nor has any pressure or force been used against me." It too bears her signature.

DiPlacidi testified that all information reflected in Exhibits 2 and 3 was freely furnished by the alien. No allegations have been made by the respondent, nor has there been any offer of proof that the information was furnished on other than a completely voluntary basis, without any coercion, duress or intimidation. There appears to have been complete compliance with the Service regulation governing arrest procedures.

Nothing in the evidence offered by the respondent in support of her motion to suppress, indicates that the arrest, even assuming *arguendo* that it was illegal, bore a relation-

ship to the information furnished hours later at the Service office. The allegations in the respondent's affidavit in support of her motion to suppress relate only to the circumstances surrounding the arrest itself. Her supporting witness testified only as to what took place at the time of the arrest. We are being asked, with no evidentiary support whatsoever, to assume that a "taint" carried over *automatically* to these documents, notwithstanding their facial compliance with evidentiary due process requirements (*Trias-Hernandez v. INS*, 528 F.2d 366 (9 Cir. 1975)), the fact that they were executed at a time and place substantially removed from the scene of the arrest, and the buttressing testimony of the Service officer that the information was given freely and voluntarily.

It is appreciated that the bar of the exclusionary rule extends to verbal evidence as much as to other physical evidence. Under the holdings in *Wong Sun v. United States*, 371 U.S. 471 (1963), and *United States v. Karathanos*, 531 F.2d 26, 34-35 (2 Cir. 1976), the taint of an original illegal arrest can carry over to such evidence, and render it inadmissible. Nevertheless, it does not do so in all cases, and in all circumstances. The rule recognizes the possibility of attenuation. Clearly, verbal statements made at the time of an illegal arrest would be inadmissible under *Wong Sun*. At the same time a voluntary confession made several days after the arrest was held admissible in *Wong Sun*, because the connection between arrest and statement had been dissipated. This case falls somewhere in between. *United States v. Karathanos*, *supra*, has an additional element of a government promise to alien witnesses, of voluntary departure without prosecution, which helped to carry the original taint over to their testimony. No such element is present in this case, and *Karathanos* is not determinative on the facts here.

Brown v. Illinois, 422 U.S. 590 (1975), places a burden on the Government to show that a later admission was an act of free will unaffected by initial Fourth Amendment illegality. *Miranda* warnings *by themselves* do not break the causal chain. *Brown*, however, rejects any automatic "but for" rule. Whether a confession is the product of a free will

under *Wong Sun*, *supra*, must be answered on the facts of each case. *Miranda* warnings are an important factor. So too are the temporal proximity of the arrest and confession, the presence of intervening circumstances, and the purpose and flagrancy of the official misconduct. *Brown v. Illinois*, *supra*, at 603 and 604.

Measured against these criteria the Service has met its burden. There is un rebutted testimony and evidence as to much more than mere *Miranda* warnings. The warnings themselves were particularly full and complete. There was an intervening lapse of time of about seven hours (as against the less than two hours in *Brown*) between arrest and statement. There is no satisfactory showing of flagrant government misconduct, nor a deliberate Fourth Amendment violation "for investigation" or for "questioning" as was the case in *Brown* (See II—below). None of the evidence relied on was obtained at the time of the arrest.² Above all, there is the testimony of the Service officer respecting the completely voluntary nature of the admissions, to establish their lack of connection with the arrest. Under these circumstances, under the rule in *Wong Sun v. U.S.*, *supra*, the admission cannot be rejected out of hand, as the majority has done.

In summary, the Service has met its burden by a combination of (1) the recitations of the documents themselves, (2) the testimony of the investigator, (3) the lapse of time, and (4) the removal to a different physical location. There is no evidence whatsoever, with respect to Exhibits 1, 2, and 3, even in the form of an offer of proof, let alone any testimony, that the respondent was in any way influenced by the circumstances of the arrest in giving the information in these exhibits. Nothing whatsoever counters the substantial government showing that whatever taint there may have been in the arrest, would have been purged, and the

² In this respect the case differs materially from *Wong Chung Che*, and *Wong Pui Tong v. INS*, 565 F.2d 166(1 Cir. 1977), where the immigration judge had placed heavy reliance on a Crewman's Landing Permit obtained from the alien himself at the scene of the arrest.

causal chain broken. The admissions and exhibits must be taken at their face value.³

Under this view of the case, it is not necessary to reach the applicability of the exclusionary rule. Even assuming a Fourth Amendment violation, the exhibits were admissible and the government has met its burden of establishing alienage and deportability by clear and convincing evidence, *Woodby v. INS*, 385 U.S. 276, 285 (1966). I would concur in a grant of the privilege of voluntary departure, the only relief for which the respondent could be eligible, solely to bring the case, which has been pending far too long, to a conclusion.

II

Assuming, *arguendo*, the necessity of examining the arrest, the second point of divergence is with respect to the majority finding that an illegal arrest has been established. As the majority notes (Dec. page 4) the facts relating to the challenged "search" were not clearly developed. The evidence as to a claimed illegal arrest consists of the respondent's affidavit in support of her motion to suppress (on advice of counsel she stood largely mute throughout the hearing) and the testimony of a witness to the arrest. Taking this evidence in its most favorable light to the respondent, there is a vagueness in crucial details.

At about 6:00 a.m., when the respondent's husband was preparing to go to work, he was alerted by a telephone call that the Service officers were on their way or were in the neighborhood. This was some 15 minutes before the investigators arrived at the apartment building in which the respondent lived with her husband.⁴ We do not know exactly what he was told on the phone, but there is at least a reasonable possibility that the officers were pursuing a specific

³ For what it is worth it will be noted that there is testimony the respondent was not held in custody "after she was brought to the office" (Tr. -23). It raises an intriguing question as to just when custody ceased.

⁴ At the time of the hearing the husband had departed to Mexico (Tr. 42).

lead directly to the respondent or her husband or both. This was not developed by either side, beyond ascertaining that the officers did not have a warrant of arrest. Again, the street entrance to the apartment building, according to testimony, was locked. There is evidence that the officers could not have gained entry into the building unless they secured permission of the caretaker on the first floor, and established in some manner their authority to enter. The record is silent in this area.

The respondent's witness, Jose Sandoval, a nephew of the respondent's husband, testified that the officers entered the apartment, knocked on the wall *after* entering, and identified themselves. Clearly, if the officers knocked *before* entering, this would be inconsistent with the representations of their entering "quickly without permission or consent." Yet, if their actions were as depicted, why would they knock at all? It is unquestioned that there was in fact a knock, raising at least the likelihood that they may have requested and received permission before entering a crucial area of inquiry if the arrest is to be the turning point of the case. The witness at first (Tr. 56) testified that the door to the respondent's apartment was locked when the immigration officers arrived. Subsequently (Tr. 59), he stated it was *not* locked. Again, this is a crucial point of inquiry.

No substantial offer of proof was made, or evidence submitted, of abusive conduct by the Service officers following the arrest. Those present were questioned as to "legal papers." There was no search of the person. The search, such as it was, was "under the beds and the rooms"—apparently for illegal aliens; nothing was taken from the persons or the premises or from the respondent herself. While these points are not determinative of the nature of the arrest itself, they do tend to negate a picture of a coerced and violent entry and search. All of these considerations, coupled with the obvious possibility for misstatement, confusion, or misunderstanding, create substantial doubts whether the respondent's allegations as to a Fourth Amendment violation can be taken at their face value.

The respondent did ask to call the arresting officer to the stand at the outset of the hearing. No objection was inter-

posed by the Service trial attorney, but the request was denied by the immigration judge as premature (Tr. 26). At the time the request was based solely on the affidavit of the respondent in support of her motion to suppress. She herself at no time testified in support of the affidavit nor did she submit herself to examination respecting the circumstances of the arrest or what took place afterwards. Instead she chose to rely on the testimony of Jose Sandoval. (Tr. 40). Following the testimony of Sandoval, both sides rested on the issue of deportability.⁵ The request to subpoena the arresting officer was never renewed, with the result that the record is left in the dubious state in which we now find it.

There was other error below. Either through lack of knowledge of the meaning of 8 C.F.R. 242.17(d), or unwillingness to rely on the somewhat clouded terminology of that regulation, the respondent not only refused to testify with respect to alienage and deportability, but gave very limited testimony in support of her application for discretionary relief of voluntary departure. In this the immigration judge was at least partly to blame in not advising (Tr. 74), that any admissions made in this connection could not be used against her on the issue of deportability. This Board has since clarified the interpretation of the regulation. An alien may testify freely in support of an application for voluntary departure without fear of adverse affect on the case in chief. *Matter of Bulos*, Interim Decision 2486 (BIA 1976). See also *Matter of Lam*, 14 I&N Dec. 168, 173 (BIA 1972); *Matter of Tsang*, 14 I&N Dec. 294, 296 (BIA 1973).

The majority decision has recognized this deficiency in the record and has solved the problem by granting voluntary departure. I would concur in that grant, as a practical matter, for the reasons stated in *I*, above, and to bring the case to a speedy conclusion. However, if the proceeding has to be remanded for other reasons, as is the case if the ex-

⁵ Respondent testified to some extent in support of her application for voluntary departure, although here too, refusing to answer many questions on 5th Amendment grounds.

clusionary rule issue is to be reached because of a possible Fourth Amendment violation, then the question of her eligibility and worthiness for this relief should also be developed fully in reopened proceedings, particularly since Exhibit 2 shows that this is her second entry. In light of *Matter of Bulos, supra*, respondent is now free to testify without restraint.

These inadequacies of the record are significant if this case is to be a tour de force on the legal issue. It has not been satisfactorily shown that the arrest was illegal. At the same time some groundwork has been laid. The majority ruling on the inapplicability of the exclusionary rule is, at the very least, premature. That issue involves a complex consideration of reach and scope of the Fourth Amendment prohibition against unreasonable search and seizure. It can affect countless cases for years to come. Should this case be made the subject of a petition for judicial review, as it gives every indication it may, a court has the right to know if it needs to reach such an issue, or if the case could be disposed of on other, well established and less controversial principles. Accordingly, again assuming the dubious necessity for meeting the issue, the record should be remanded for full development of the circumstances of the arrest, including the testimony of the arresting officer and of the respondent should she elect to testify. If, on remand, a lawful arrest is proved, the issue can then be met with full knowledge of all of the facts, and anaappreciation that it is real rather than hypothesized.⁶

The argument is not convincing that, since the Service has already expressed its view that the exclusionary rule has no applicability in these cases, a remand would serve no useful purpose. The Service has adopted a similar position as to *Miranda* warnings, yet they are in fact required by regulation, appear in Service forms, and are given, even though not judicially mandated. 8 C.F.R. 287.3; *Navia-Duran v. INS*, 568 F.2d 803 (5 Cir. 1977); *Trias-*

⁶ This also would have the indicental benefit of facilitating evaluation of the quality of the Fourth Amendment violation, if any, in accord with the rule in *Brown v. Illinois, supra*.

Hernandez v. INS, 528 F.2d 366 (9 Cir. 1975). Either for purposes of this case, or for clarification of the record in anticipation of a court challenge, or in defense of Immigration and Naturalization Service actions and those of government officers generally, or having in mind possible criminal prosecution in this and in other cases, or for other reasons not known to this Board, the Service might still prefer to amplify this record. More importantly, a remand is required *for the sake of the respondent*.

If the respondent's legal position should be examined on judicial review, it should not meet with a rebuff solely as a result of her not having an opportunity to present significant evidence.

III

Lastly, since this case may well reach the courts in its present posture, it is necessary to state a position on the applicability of the exclusionary rule in deportation proceedings.

It is difficult to quarrel with substantial portions of the majority decision. The applicability of the exclusionary rule in civil proceedings, generally, does appear to be a viable issue. *Weeks v. U.S.*, 232 U.S. 383 (1914); *Wong Sun v. U.S.*, 371 U.S. 471 (1963); *U.S. v. Janis*, 428 U.S. 433 (1976); cf. Concurring Opinion Chairman Roberts, *Matter of Yau*, 14 I&N Dec. 630, 637 (BIA 1974). Concededly too, it has now been established that the deterrent effect of the rule underlies its purpose and usefulness. *U.S. v. Calandra*, 414 U.S. 338 (1974); *United States v. Janis*, *supra*.

Some impatience with the application of the exclusionary rule in deportation proceedings, is also understandable. In case after case, this Board has been confronted with a mute alien and a claim that evidence is tainted by a Fourth Amendment violation and hence should be excluded. Unlike the instant case, frequently no foundation whatsoever has been laid for such a claim. As Board Member Farb noted in his separate concurring opinion, the claims are often advanced in that large body of cases involving claimed recent entrants without inspection, as to whom there usually exist

no Service records and little besides the aliens' own admissions to establish alienage and deportability. In many such cases no affirmative defense to deportability is offered, no offer of proof of improper Service action is advanced, at least in correct or substantial form, and a loud outcry is made for production of the arresting officer, whether his testimony is shown to be necessary or not, presumably so that the respondent may lose himself, the Service, and this Board, in the thickets of obfuscation and delay thus created.

To the extent that this sort of irresponsible challenge is a by-product of holding the exclusionary rule applicable in deportation cases, the majority decision is correct. However, that a challenge may be mounted irresponsibly, in itself does not justify rejection of the rule as a matter of law. Rather, each claim must be met on a case-to-case basis with patience and firmness, and with due regard to the merits of the given case. The exclusionary rule protects the long time lawful permanent resident just as much as the recent entrant without inspection. In any event, it is doubtful that elimination of the exclusionary rule will cure these claims. Challenges to the admissibility of evidence can always be counted on allegations of duress, coercion, and lack of due process. 8 C.F.R. 287.3 bears indigenous seeds for motions to suppress for failure to follow correct arrest procedures. As long as this regulation remains in the books—and the Service, thankfully, has shown no inclination towards removing it—there is always the possibility of a frivolous and purely dilatory challenge to the admissibility of evidence.

However, the majority decision glosses over, much too lightly, one very serious, and perhaps determinative, consideration. It is too late in the game for a change of Service or Board position regarding the applicability of the exclusionary rule. The fact is that the Immigration and Naturalization Service has accepted and applied the rule, as has this Board, for many years and in countless cases since the dictum in *U.S. ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923) that "evidence obtained *** through an illegal search and seizure cannot be made the basis of a finding in

deportation proceedings." As the majority notes, the Board has often pointed to untainted evidence in cases involving this issue, as the basis for its decision, and has refused to rely on evidence which might be flawed by a Fourth Amendment violation. *See, for example, Matter of Cheung*, 13 I&N Dec. 794, 796 (BIA 1971); *Matter of Wong*, 13 I&N Dec. 820, 822 (BIA 1971); *Matter of Hemblen*, 14 I&N Dec. 739 (BIA 1974). The published decisions are replete with discussion of the admissibility of evidence challenged on the ground of illegal arrest and search—discussion which would be surplusage if the Board were not applying and following the exclusionary rule. It is totally irrelevant that the rule has been followed and applied, sometimes expressly, and sometimes by implication. The rule has been followed. There is no question whatsoever that this is the case.⁷

The rule having been accepted and followed for so many years, the natural inquiry is—what reason is there for a change now? The majority decision fails to answer this satisfactorily. The Service has advanced no argument for a change beyond mere reliance on the civil nature of deportation proceedings, and advice that, according to a memorandum of the Associate Attorney General, the Department of Justice is adopting, generally, the rule which the Service is now urging upon us. We, of course, are not bound by the enunciation of position of the Associate Attorney General. *See U.S. ex rel Accardi v. Shaughnessy*, 347 U.S. 260 (98 L.Ed. 681, 74 S.Ct. 499).

Despite the strident debate by legal scholars over its efficacy, the exclusionary rule remains the law of the land. To date, nothing in the precedents has limited its application to criminal cases. On the contrary, its application to some

⁷ A partial list of relevant administrative and judicial decisions is set forth in the APPENDIX. As is to be expected, the growth in the sophistication of the challenges is compatible with that of the judicial rulings. While the references to the Fourth Amendment, "tainted evidence," "fruit of the poisoned tree, the exclusionary rule," and formal Motion to Suppress, appear, as such, primarily in the later decisions, the basic underlying challenge to the admissibility of evidence is the same in all of the cited cases, namely, that it was procured by a Fourth Amendment violation.

civil proceedings has been recognized in the federal courts. *See, for example, Pizarello v. U.S.*, 408 F.2d 579 (2 Cir. 1969), *cert. denied*, 396 U.S. 986 (1969)—civil assessment of wagering taxes; *Knoll Associate Inc. v. Federal Trade Commission*, 397 F.2d 530 (7 Cir. 1968)—use of stolen documents by Federal Trade Commission barred in civil action; *Powell v. Zuckert*, 366 F.2d 634 (D.C. Cir. 1966)—review of plaintiff's discharge from the Air Force; *One 1958 Plymouth Sedan v. Commonwealth of Pa.*, 380 U.S. 693 (1965)—civil proceeding by the state for the forfeiture on an automobile; *Rogers v. U.S.*, 97 F.2d 691 (1 Cir. 1938)—civil action to recover customs duties on imported liquors; *U.S. v. Blank*, 261 F.Supp. 180 (N.D. Ohio 1966)—civil tax assessment; *Lassoff v. Gray*, 207 F.Supp. 843 (W.D. Kentucky 1962)—civil liability for wagering taxes and assessment. *See also U.S. v. Janis, supra*, at 455, 456 and cases there cited. There is also judicial recognition of its use in deportation proceedings, *Ex parte Jackson*, 263 F.110 (DC Mont. 1920), appeal dismissed 267 F.1022 (9 Cir. 1920); *Schenck ex rel Chow Fook Hong v. Ward*, 24 F.Supp. 776 (DC Mass 1938); *Wong Chung Che v. INS*, 565 F.2d 166 (1 Cir. 1977); (and see also court cases cited in APPENDIX).

The rationale of these cases is well expressed in *U.S. v. Blank, supra*, "Where as here there is a correlative civil action open to the Government which imposes a penalty *** commensurate with the criminal sanctions to which as accused, victimized by an illegal search would be exposed, then we see no distinguishable difference between the two forms of punishment which excuses the government from complying with constitutional mandates when prosecuting their action in a civil forum." *Id.*, at 182. While the applicability of the rule in *all* civil proceedings would be highly questionable—and in fact has been rejected, *U.S. v. Frederickson*, 581 F.2d 711 (8 Cir. 1978); *U.S. ex rel. Sperling v. Fitzpatrick*, 426 F.2d 1161 (2 Cir. 1970), absent special considerations it would seem that a nexus to a criminal sanction should reasonably dictate its use. *One 1958 Plymouth Sedan v. Commonwealth of Pa., supra.*

It will be noted that all of the foregoing cases involved *intrasovereign* violations, a careful distinction drawn in *Janis, supra*. Their precedent force, therefore, is in no way impeached by *Janis*, a decision based on the blunting of the deterrent effect of the rule by the lack of interaction between the federal criminal proceeding, and a state civil proceeding. *Janis*, on the other hand, does emphasize the significance of the proximity of the deterred action to the result sought to be achieved.

We are concerned here with one Governmental agency and the enforcement of a statute narrowly restricted to aliens. The evidence supporting the civil deportation case is frequently the same as that which may support a criminal proceeding against the same person. See, for example, Section 275 I&N Act, 8 U.S.C. 1325 (Illegal Entry). The same arresting officer initiates both proceedings and precipitates either or both of the results—*i.e.*, civil or criminal. Even with full awareness of the many cases rejecting, in a civil deportation proceeding, one cannot ignore the severe consequences of deportation in some cases, and its analogy to a criminal sanction (*Fong Haw Tan v. Phelan*, 333 U.S. 6, 10). Despite the circumscription of such rulings as *Almeida-Sanchez v. INS*, 413 U.S. 266 (1973); *Brignoni-Ponce*, 422 U.S. 873 (1975); and *U.S. v. Martinez-Fuerte*, 514 F.2d 308 (9 Cir. 1975), Immigration and Naturalization Service officers have wide latitude to arrest without warrant, both in anticipation of criminal proceedings, and/or as a precursor to the civil deportation proceedings (Section 287, Section 235, I&N Act, 8 U.S.C. 1357 and 1225).

In essence, civil and criminal proceedings walk hand in hand in *intrasovereign* wedlock. We have, therefore, the two requisites for use of the rule in civil proceedings: 1) an *intrasovereign* relationship, and 2) a correlative criminal sanction. Under the majority position, the government may have a criminal action against an alien for violation of section 275 (8 U.S.C. 1325) thrown out because of fatally contaminated evidence, and then turn right around and proceed against him in a deportation proceeding of equal or greater consequence, relying on the identical evidence. This is wrong. *U.S. v. Blank*; *One 1958 Plymouth Sedan v. Commonwealth of Pa.*, *supra*.

Underlying the majority decision is the premise that there is something inherent in a civil deportation proceeding, as against a criminal proceeding, which makes the application of the rule (a) less necessary, and (b) less effective. Neither of these assumptions is acceptable.

There is inconsistency in the majority reasoning that since the exclusionary rule will continue to deter misconduct because criminal proceedings may flow from the deportation "arrest," therefore it is not necessary to apply the rule to the civil proceedings flowing from that arrest. The deportation itself, in some cases, civil or not, is a far more serious consequence than the brief imprisonment or negligible fine customarily meted out for criminal immigration violations, by the courts. If necessary and effective as a deterrent flowing from inability to establish the criminal case, it is at least just as necessary as to the civil one.

The Fourth Amendment guards the right of the "people" to the security of their homes, property and persons. It is not limited in its language either, as to criminal cases or as to citizens.⁸ The exclusionary rule, in turn, links the power to search and seize with the use of incriminatory evidence. Its purpose is to insure that an abuse of one takes the profit out of the acquisition of the other. It prevents the violation by penalizing the violator. Aborting the consequences of a violation is only an incidental result, or better stated, a means to the primary end of curbing Fourth Amendment violations.

So long as an abuse of a power to invade privacy and arrest and search, might be an integral part of the gathering of incriminatory evidence for use in either a civil or criminal proceeding, as is possible in deportation cases, it would seem to make little difference, so far as the violation is con-

⁸ "For the inalienable rights of personal security and safety, orderly and due process of law, are the fundamentals of social compact, the basis of organized society, the essence and justification of government, the foundation, key, and capstones of the Constitution. They are limited to no man, race, or nation, to no time, place, or occasion, but belong to man, always, everywhere, and in all circumstance. Every nation demands them for its people from all other nations." *Ex parte Jackson*, 263 F.110, 113.

cerned, if the end result is the use of the evidence in a civil, or criminal, proceeding, or both. If anything, looking to the need for the rule, it would seem to follow that the less significant the objective sought to be obtained by the breach of the constitutional imperative, the more reprehensible and needful of restraint or deterrence, is the violation. Certainly nothing in the inherent nature of a civil deportation proceeding, even assuming it has less "importance" than a criminal case, supports the conclusion the rule is less necessary. Indeed, given the possible lack of education of the alien, frequent language difficulties, and unfamiliarity with either the law or his rights in a strange country, the opposite would seem to be the case.

To evaluate the *effectiveness* of the rule when applied to deportation proceedings, it is necessary to appreciate its rationale. The exclusionary rule is premised on the assumption that the likelihood of aborting a prosecution is a sufficiently significant loss to an officer, to deter him from violations in the future. The majority, in effect then, is saying that the civil deportation proceeding is not sufficiently significant, as compared with criminal proceeding based on the same facts, to bring the deterrent effect of the rule into play.

This too does not withstand examination. On the contrary, if the evidence is barred in the civil deportation proceedings, the consequences are grave enough that the deterrent effect is equivalent to that in a criminal proceeding stemming from the same breach of the law. As for the officer, one possible result of his violation could be, as the majority notes, that the illegal alien may be forever in a non-deportable status. At the very least, new proceedings, wasteful of manpower and money, and uncertain in result, might have to be begun. This should certainly deter a conscientious Service officer from the violation. The conclusion is inevitable that the rationale of the exclusionary rule compels its application to this proceeding.

That there is a paucity of cases terminated because of Fourth Amendment violations, is the soundest proof that the Service has been able to live more than adequately with the rule and that, as the majority noted (Dec. 13), the "soci-

etal costs" of the application of the rule have been minimal. Indeed, if one is to look to consequences (admittedly a questionable basis for decision making), there is probably no better way to facilitate confusion and delay in these cases than through the litigious weapon the majority has now forged. Where hitherto the Board has patiently examined each of these claims of Fourth Amendment violations, their summary rejection as a matter of law, can only spawn repeated, unexamined, un rebutted, and, undoubtedly, lurid, claims of abuse.

In the past the Board has demanded an acceptable nonfrivolous offer of proof as a minimum. *Matter of Geronimo*, 13 I&N Dec. 680 (BIA 1971); *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971); *U.S. v. Garcia*, 272 F.Supp. 286 (S.D.N.Y. 1967); *Matter of Godfrey*, 13 I&N Dec. 790 (BIA 1971); *Matter of Wong*, 13 I&N Dec. 820 (BIA 1971). It has relied only on clearly untainted evidence. If an immigration judge failed in this regard, or misunderstood the position of this Board, the questioned evidence was either given no weight, rejected outright, or the case was returned so that the record might be clarified as to just what had occurred and whether the evidence was tainted or not. See, for example, *Matter of Cheung* and *Matter of Wong*, *supra*. In at least one instance where the Board failed to clearly set forth its reasons for accepting apparently questionable evidence, it was quickly called to account. *Wong Chong Che v. INS*, 565 F.2d 166 (1 Cir. 1977). With this screening, the rule has worked, and the frivolous claim has been sifted out, generally without too much trouble. On the other hand, the occasional nonfrivolous claim, supported by hard facts, has received the attention that it deserves.

In summary, the long standing practice of the Board has been to recognize and apply the exclusionary rule. This has been satisfactory up to this point, due in part to a screening process which weeds out frivolous and irresponsible claims, yet permits scrutiny of substantial challenges. No adequate reason for a change in the Board's position has been put forth. There is judicial support for the use of exclusionary rule in civil proceedings, including deportation proceedings. Precedents dictate its use in civil proceedings involv-

ing (1) an intrasovereign relationship and (2) a correlative criminal proceeding. Deportation is such a proceeding. The reason for the existence of the rule dictates its application here, both in the *need* for the rule and its possible *effectiveness* as a deterrent. Lastly, experience has shown an absence of serious societal costs in the use of the rule in deportation proceedings.

For all of the above reasons I am unable to concur in that portion of the majority decision which holds that the exclusionary rule is inapplicable in civil deportation proceedings.⁹

Solely for the reasons set forth under Part I of this separate decision, I would find the alien deportable, and would grant voluntary departure within 30 days from the date of this order or such further extension as might be granted by the District Director.

APPENDIX

Matter of B—R—, I&N Dec. 760 (BIA 1952); *Matter of D—M—*, 6I&N Dec. 726, 729 (BIA 1955); *Matter of R—S—*, 71 I & N Dec. 271 (A.G. 1956); *Matter of T—*, 9 I&N Dec. 646, 647 (BIA 1962); *Matter of Pang*; 11 I&N Dec. 213 (BIA 1965), *aff'd sub nom.*; *Ah Chiu Pang v. INS*, 368 F.2d 637 (3 Cir. 1966), *cert. denied*, 386 U.S. 1037; *Matter of Chen*, 12 I&N Dec. 603 (BIA 1968); *Matter of Yam*, 12 I&N Dec. 676 (BIA 1968), *aff'd*, *Yam Sang Kwai v. INS*, 411 F.2d 683 (D.C. Cir. 1969), *cert. denied*, 396 U.S. 877; *Matter of Doo*, 13 I&N Dec. 30 (BIA 1968); *Matter of Methure*, 13 I&N Dec. 522 (BIA 1970); *Matter of Lane*, 13 I&N Dec. 632 (BIA 1970); *Matter of Yau*, 14 I&N Dec. 630 (BIA 1974); *Matter of Scavo*, 14 I&N Dec. 326 (BIA 1973); *Matter of Tsang*, 14 I&N Dec. 294 (BIA 1973); *Matter of Wong*, 13 I&N Dec. 820 (BIA 1971); *Matter of Tang*, 13 I&N Dec. 691 (BIA 1971); *Matter of Au, Yim*,

⁹ There may be alternatives (Dec. P.14ff). They may or may not be effective. Clearly, their existence does not compel rejection of the present remedy. Employee complaints to the Service might seem of questionable effectiveness; and the parameters of *Bevins v. Six Unknown Narcotics Agents*, 403 U.S. 388 (1971), and not yet fully known.

and *Lam*, 13 I&N Dec. 294 (BIA 1969); *aff'd*, *Au Yi Lau v. INS*, 445 F.2d 217 (D.C. Cir. 1971), *cert. denied*, 404 U.S. 864; *Matter of Burgos and Burgos-Godoy*, Interim Decision 2375 (BIA 1975); *Matter of Chen*, Interim Decision 2440 (BIA 1975), *aff'd* *Nai Cheng Chen v. INS*, 537 F.2d 566 (1 Cir. 1976); *Matter of Rojas*, Interim Decision 2444 (BIA 1975); *Matter of Bulos*, Interim Decision 2486 (BIA 1976); *Matter of Rojas*, Interim Decision 2510 (BIA 1976); *Matter of Davila*, Interim Decision 2521 (BIA 1976); *Matter of Mejia*, Interim Decision 2527 (BIA 1976); *Matter of Gonzalez*, Interim Decision 2536 (BIA 1976); *Matter of Escobar*, Interim Decision 2538 (BIA 1976); *Matter of Castro*, Interim Decision 2547 (BIA 1976); *Matter of Baltazar*, Interim Decision 2556 (BIA 1977) *Matter of Cachiguango and Torres*, Interim Decision 2582 (BIA 1977); *Matter of Taerghodsi*, Interim Decision 2596 (BIA 1977); *Matter of King and Yang*, Interim Decision 2647 (BIA 1978).

See also *Klissas v. INS*, 361 F.2d 529 (D.C. Cir. 1966); *Vlissidis v. Anadell*, 262 F.2d 398 (7 Cir. 1959); *Ho Chong Tsao v. INS*, 538 F.2d 667 (5 Cir. 1976); *Aguirre v. INS*, 553 F.2d 501 (5 Cir. 1977); *Cordon de Ruano v. INS*, 554 F.2d 944 (9 Cir. 1977); *Hoonsilapa v. INS*, 575 F.2d 735 (9 Cir. 1978); *Cheung Tin Wong v. INS*, 468 F.2d 1123 (D.C. Cir. 1972); *Shu Fuk Cheung v. INS*, 476 F.2d 1180 (8 Cir. 1973); *Huerta-Cabrera v. INS*, 466 F.2d 759 (7 Cir. 1972); *Ojeda-Vinales v. INS*, 523 F.2d 286, 287-288 (2 Cir. 1975); *Illinois Migrant Council v. Pilliod*, 548 F.2d 715 (7 Cir. 1977); *modifying*, 540 F.2d 1062 (7 Cir. 1976); *Marquez v. Kiley*, 436 F.Supp. 100 (S.D.N.Y. 1977); *Shan Gan Lee v. INS*, 590 F.2d 497 (3 Cir. 1979).

In the Supreme Court of the United States

No. 83-491

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER,

v.

ADAN LOPEZ-MENDOZA;

and

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER,

v.

ELIAS SANDOVAL-SANCHEZ

ORDER ALLOWING CERTIORARI. Filed *January 9,*
1984.

The petition herein for a writ of certiorari to the *United States Court of Appeals for the Ninth Circuit* is granted.

FILED

NOV 28 1983

MAURICE L. STEVENS

CLERK

IN THE

Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

—v.—

ADAN LOPEZ-MENDOZA and ELIAS SANDOVAL-SANCHEZ,

Respondents.

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

May the Immigration and Naturalization Service use in deportation proceedings evidence its agents obtain in violation of the Fourth Amendment?

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STATEMENT OF THE CASE

In separate deportation proceedings, Respondents Adan Lopez-Mendoza and Elias Sandoval-Sanchez tried unsuccessfully to prevent the use of evidence unlawfully obtained by Immigration and Naturalization Service (INS) agents.

1. Respondent Lopez was arrested by INS agents in August 1976 at his workplace, a wholesale transmission repair shop in San Mateo, California. Nearly a full month before the arrest, INS Agents Eddy and Elder received an interoffice memorandum regarding a tip received by INS that seven named illegal aliens were working there (L.A.R. 34, 140).^{1/} The agents failed to corroborate the tip either by conducting a record search or by investigating further. The day before the

^{1/} "L.A.R." refers to the administrative record in Lopez-Mendoza; "S.A.R." refers to the administrative record in Sandoval-Sanchez.

arrest, however, they drove by the shop, confirmed its location, and telephoned the informant, a person previously unknown to them, to verify the allegations. Based solely on their telephone conversation, which yielded no additional details, they decided to visit the shop the next day for the purpose of interviewing the persons named by the informant (L.A.R. 34-35, 50-51, 66). At no time did the agents seek an arrest warrant for the named individuals or a search warrant to enter and search the private business premises. In fact, they had concluded that they did not have enough information to obtain either an arrest or search warrant (L.A.R. 50,55,74,81).

The two agents arrived at the shop at approximately 7:45 a.m. One agent approached the owner, Art Bradley, to request permission to conduct the interviews while the other stationed himself at the only door so that

anyone inside would be prevented from leaving the premises. The owner refused permission for interviews during working hours "without a court order" (L.A.R. 38), and suggested that they come back at noon while the workers were eating lunch. Because the agents "didn't feel like waiting four hours" by the door in order to apprehend anyone leaving (L.A.R. 81), they persisted in their demand for immediate interviews. As their persistence intensified, so did the owner's agitation, until he eventually demanded that the city police be called (L.A.R. 106).

While agent Elder diverted the attention of the owner, agent Eddy advanced into the shop and approached Lopez. The agent chose him for questioning solely because he was "relatively isolated" and therefore the owner could not interfere with the interview (L.A.R. 44). Nothing in Lopez's appearance, behavior, or speech had aroused the agent's

suspicion. Furthermore, according to the government's version of the facts, Lopez's name was not on the list provided by the informant. In response to the agent's questioning, Lopez gave his name and indicated that he was from Mexico with no close family ties in the United States (L.A.R. 40-41). The agent placed him under arrest. The agent also questioned another worker, Nelson Melendez, a permanent resident of the United States, who was asked for his name and whether he was a citizen or resident of the United States (L.A.R. 106). Both agents then engaged in an argument with Bradley, which at this point bordered on a physical confrontation (L.A.R. 62). Bradley placed himself between the agents and Lopez and indicated that they had no right to remove him without a court order. Agent Eddy emphatically poked Bradley on the chest with his finger and said that if he continued to

interfere, they would arrest him (L.A.R. 63). They then departed with Lopez in custody.

Lopez underwent further interrogation at INS offices where, without advice of counsel, he allegedly indicated he was born in Mexico, was still a citizen of Mexico, and that he entered without inspection (L.A.R. 118-119). Based on his answers, the agents prepared the I-213, "Record of Deportable Alien," and accompanying affidavit (L.A.R. 135-137).

The only evidence introduced by the INS against Lopez at his deportation hearing was the Form I-213 and the accompanying affidavit. Prior to the proceeding on the merits, Lopez, through counsel, sought a hearing on the legality of the arrest (L.A.R. 32). The immigration judge commenced a hearing, but prior to its completion, determined that an illegal arrest did not

affect "the propriety" of the proceeding. He therefore declined to make findings of fact regarding the legality of the arrest (L.A.R. 113-114), although he did allow counsel for Lopez to make an offer of proof (L.A.R. 101-107). The immigration judge found him deportable, and granted him the privilege of voluntary departure (L.A.R. 28).

The Board of Immigration Appeals dismissed Lopez's appeal, relying upon its decision in Matter of Sandoval, 17 I. & N. Dec.70 (BIA 1979), in which contrary to its prior longstanding practice, it had concluded that the exclusionary rule does not apply in deportation proceedings.

2. INS arrested Respondent Sandoval in 1976 during a raid at his workplace, a food processing plant in Pasco, Washington. INS agents surrounded the plant to guard the exits on all four sides (S.A.R. 40). Investigator Bower, an INS law enforcement

officer, and Officer Spence, a uniformed Border Patrol officer, entered the plant and stationed themselves at the entrance to the main work area during a change of shift. They checked the workers as one group filed past to leave work and another group filed past to enter the main work area (S.A.R. 50). Elias Sandoval was in a line of workers entering the main work area to commence work on the 3:00 p.m. shift (S.A.R. 65). He was dressed in his work uniform, which included a hard hat, apron, and face mask (S.A.R. 27, 49, 65-66). Sandoval testified that he observed a man in uniform who appeared to be a police officer (S.A.R. 66), and that this officer forcibly seized him by the back of the pants and the shoulder, took him out of line and placed him in the men's rest room of the plant (S.A.R. 64-65).^{2/} After being held

^{2/} It is unclear from the record whether any immigration officer said anything to Sandoval

in the men's rest room, Sandoval was one of at least 37 people taken to the Pasco Police Department for further processing (S.A.R. 41, 56).

At the deportation hearing, Investigator Bower had no specific or even general recollection of the initial contact, subsequent conversation, interrogation, apprehension and detention of Sandoval (S.A.R. 40-41, 43-44, 49-50).^{3/} Bower

prior to his detention. Mr. Sandoval's counsel, Charles Barr, asked Sandoval whether the immigration officer said anything to him in English prior to his telling him to go to the rest room (which the officers used as a holding area for those they wished to question further, S.A.R. 47, 52). Mr. Sandoval's response is not recorded. (The record contains numerous omissions of Sandoval's testimony at S.A.R. 62-66, 68.)

^{3/} In response to a question from Mr. Barr as to why Officer Bower believed he had probable cause to detain Mr. Sandoval, Officer Bower testified:

A. We just initially detained because of the large number of people coming in and out of there. I initially detained them to question them further. Some people immediately said that they had United States

testified that his general practice was that if there were some kind of furtive conduct in line, he would question the subject in English. If the subject failed to respond, Bower's practice was to ask in Spanish if the particular person had any papers and sometimes to question that person further or detain him to question at a later time (S.A.R. 27, 54-55).

citizen wife, or maybe United States citizen children, and would fall within a category that they may have something going for them. Some were detained for more interrogation to figure out whether they would be taken, left at the plant or whether they would be further processed in the processing facility, which happens to be the Pasco Police Department in that area.

Q. That is your complete rationale?

A. Yes.

Q. A large number of people, temporary detention, in order to investigate further at your convenience?

A. A lot of them were talked to further there and ones that had wives, ones that had kids, ones that were single, determining which we handled in which manner, whether they should even be left there at the plant. For instance, I had one present a document of some kind of another, wanted to talk to him more, at the time too busy talking to everybody else, he had to wait for further questioning. (S.A.R. 55-56).

At the Pasco Police Department, Sandoval was processed by Officer Bower who did not advise Mr. Sandoval of his rights (S.A.R. 58). Officer Bower explained to Sandoval the I-274 (voluntary departure) process, including his right to a deportation hearing and counsel. Sandoval refused to sign the I-274 requesting voluntary departure and asked for his counsel, Charles Barr (S.A.R. 59-60). Officer Bower asked Sandoval a series of questions concerning his immigration status. Based on the answers to these questions, Officer Bower filled out an I-213, "Record of Deportable Alien," in which he indicated that Sandoval was born in Mexico and that he entered the U.S. without inspection (S.A.R. 81).

During the deportation hearing the government offered the I-213 to prove deportability (S.A.R. 46). Sandoval's counsel moved to suppress the I-213 and to

terminate the proceedings (S.A.R. 61-62). By counsel, Sandoval argued to the immigration judge that the evidence relied upon by the government should be suppressed because the warrantless arrest was unlawful and the I-213 was the "fruit of poisonous tree." The immigration judge ruled that the arrest did not violate the Fourth Amendment, stating as follows: "The respondent could have at some time during the time in question reacted in a furtive manner in the presence of the officials. This plus foreign appearance would give rise to a suspicion of alienage. . . . The respondent has failed to prove that this is not what took place in this case" (S.A.R. 28-29). Based on the written record of Sandoval's admissions contained in the I-213, the immigration judge found him deportable.

On appeal, the Board of Immigration Appeals held that Sandoval's statements were

voluntary and found "no basis to conclude . . . that the circumstances of the respondent's arrest affected the statements contained in the form I-213" (S.A.R. 17-18).

3. On petitions for review of their deportation orders, the Ninth Circuit consolidated the cases for argument en banc, and held in a seven to four decision that 1) Sandoval's detention at the police station constituted an arrest not based upon probable cause, and was therefore unlawful under the Fourth Amendment; 2) that the statements of illegal alienage Sandoval made were a product of the unlawful detention within the meaning of Brown v. Illinois, 422 U.S. 590 (1975); and 3) that "the exclusionary rule bars the INS from using, in deportation proceedings, evidence of statements it obtains illegally." 705 F.2d at 1061. The court therefore reversed Sandoval's order of deportation. Lopez's order of deportation was

vacated and remanded for further proceedings in light of its decision in Sandoval's case.^{4/}

In reaching its decision, the court of appeals applied the analysis set forth in United States v. Janis, 428 U.S. 433 (1976). The court first examined the strength of the connection between those who illegally obtained the evidence, and those that seek to use it in a subsequent proceeding. The court observed that not only are the officers and prosecutors members of the same government agency, but they also share a common goal and purpose. The INS agents who interrogated Sandoval after arresting him "did so exclusively to aid in filling out INS Form I-213, the form used by INS attorneys at Sandoval's deportation hearing to prove deportability." 705 F.2d at

^{4/} The question of whether Lopez's detention violated the Fourth Amendment was not adjudicated in his deportation hearing.

1069.

The court next considered the extent to which the persons whose "conduct is to be controlled" are already subject to the deterrent effects of the rule. Because deportation of illegal aliens is the prime concern of immigration officers, rather than criminal prosecutions,^{5/} the court concluded that deportation is within the agents' "zone of primary interest." The court therefore deemed it "highly unlikely that INS officers will be deterred from violating the Fourth Amendment by the prospect of unsuccessful criminal prosecutions," 705 F.2d at 107, and found the marginal deterrent value of imposing the sanction in deportation proceedings to be direct, substantial, and efficient.

^{5/} The court noted that fewer than 2% of deportable aliens who are apprehended are

Although the court acknowledged that there is authority that the sanction is "routinely" applied in "core" cases like the present one where the deterrent value is strong, the court proceeded under Janis to assess the "social cost of applying the exclusionary rule in deportation proceedings and to balance that cost against the substantial deterrent impact of the sanction on INS misconduct." 705 F.2d at 1071. In terms of the numbers of aliens who would escape deportation by the suppression of illegally obtained evidence, the court found that, based on past INS experience with the rule, "only an infinitesimal fraction of the illegal alien population will mount challenges based on the exclusionary rule and that the small number who do so successfully will not appreciably increase the number of

ever convicted of criminal violations of immigration laws. 705 F.2d at 1069.

illegal aliens in our midst." Id. The court rejected after close scrutiny the government's argument that the courts will be sanctioning a continuing violation of the immigration laws, and concluded that "the marginal deterrent benefit far outweighs the social cost of barring the INS from using in deportation proceedings evidence its officers seize in violation of the Fourth Amendment." 705 F.2d at 1073. The court also examined and rejected as "unrealistic and unacceptable" each of the alternatives to the exclusionary rule suggested by INS. 705 F.2d at 1073-1074. In sum, the court concluded, based in part on past INS experience with the rule, that the "only realistic way" to ensure that INS agents respect the values embodied in the Fourth Amendment is to apply the exclusionary rule in deportation proceedings. 705 F.2d at 1075.

REASONS FOR DENYING THE PETITION

The decision below represents the first time a federal court has re-examined the issue of whether the exclusionary rule applies in deportation proceedings since the Board of Immigration Appeals (BIA) in 1979, in the words of the court below, "cut against the grain of its own historic practice and the views of every court and commentator to have considered the issue," and held, in a case unrelated to this one, that the exclusionary rule does not bar the INS from using evidence obtained in violation of the Fourth Amendment. Matter of Sandoval, 17 I. & N. Dec. 70,93 (BIA 1979) (sanctioning use of evidence seized by INS agents during illegal search of an alien's home). In holding that the rule does apply, the court of appeals

follows a long and consistent history of the rule's application in deportation proceedings by the federal courts. There is no conflict among the circuits. The only other court of appeals to have expressly considered the issue has held that the rule applies, following what had long been thought to be settled law in this area. Wong Chung Che v. INS, 565 F.2d 166 (1st Cir. 1977). Contrary to the government's characterization of the question presented as whether the rule should be "extended," and its assertion that the Ninth Circuit's decision creates a "new barrier" which threatens "mortal injury" to enforcement of immigration laws, the decision below merely marks a return to longstanding former practice. Until 1979, the INS "performed its investigative and prosecutorial functions in a legal regime in which the exclusionary rule was thought to apply." 705 F.2d at 1065.

The decision below also fully comports with the applicable decisions of this Court. There is no question that protections of the Fourth Amendment apply to aliens discovered in this country.^{6/} The government so concedes. (Pet. at 12). Moreover, the government does "not contend that the civil nature of a deportation proceeding is necessarily controlling." (Pet. at 21).^{7/}

^{6/} See, e.g., United States v. Brignoni-Ponce, 422 U.S. 873 (1975); Abel v. United States, 362 U.S. 217 (1960). Important Fourth Amendment values to be preserved include safeguarding the privacy and security of individuals, protecting against undue interference with the rights of lawabiding persons, and avoiding unsettling or frightening shows of authority by government officials. See, e.g., Almeida-Sanchez v. United States, 413 U.S. 266, 273-274 (1973); see also Marshall v. Barlow's, Inc., 436 U.S. 307, 312 (1978); United States v. Martinez-Fuerte, 428 U.S. 543, 558 (1976).

^{7/} Categorizing deportation proceedings as quasi-criminal rather than as civil provides an alternative justification for the holding below, although the court of appeals did not rely on that ground in reaching its decision, 705 F.2d at 1065 n.9. Deportation is imposed for violation of the same immigration laws on

The government concedes that the court below was correct in engaging in the same inquiry this Court made in United States v. Janis, 428 U.S. 433 (1976), a cost-benefit analysis, but suggests that it "went wrong in the values it brought to its analysis." (Pet. at 12, emphasis added.) As discussed below, the Ninth Circuit's decision properly applied the analysis set forth in Janis, and carefully weighed the effects of applying the rule in this context. The court below recognized and appreciated the "intractable nature of the problem of illegal immigration" and the "magnitude of the enforcement task that

which criminal prosecutions are based, and in many cases, deportation poses a more serious penalty than that usually imposed in criminal prosecutions. See Bridges v. Wixon, 326 U.S. 135, 154 (1945); Matter of Sandoval, 17 I. & N. Dec. at 96 (Applemen, Bd. member, dissenting). Deportation proceedings thus closely resemble criminal forfeiture proceedings, and application of the exclusionary rule may therefore be justified under the rationale of One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 393 (1965).

Congress has assigned INS." 705 F.2d. at 1073. Based upon past experience of applying the rule in deportation proceedings, as well as the BIA's post-Sandoval practice of reaching Fifth Amendment issues, including under this rubric particularly flagrant Fourth Amendment violations, the court below was justified in concluding that its decision would not overburden the INS enforcement system. The BIA itself has conceded that application of "the rule would not appear to have the potential to significantly impact on this country's immigration laws and policies," Matter of Sandoval, 17 I. & N. Dec. at 80.

Prudential considerations militate against granting the government's petition as well. The government chose not to seek review of the court of appeal's ruling that INS violated the Fourth Amendment by illegally arresting Respondent Sandoval (Pet.

at 20, n.14), and no determination has ever been made on the underlying Fourth Amendment issue with regard to Respondent Lopez. At the same time, the government appears unwilling to concede an underlying Fourth Amendment violation in this case. For example, the government argues that there is no demonstrated need to invoke the exclusionary rule "where it is not at all clear that any Fourth Amendment violation actually occurred." (Pet. at 22). The government cannot have it both ways, and should not have asked this Court to anticipate a question of constitutional law in advance of the necessity of deciding it. As this Court noted last term in Illinois v. Gates, ___ U.S. ___, 76 L.Ed.2d 527, 539, 103 S.Ct. ___ (1983), "[w]here difficult issues of great public importance are involved, there are strong reasons to adhere scrupulously to the customary limitations on

our discretion." By failing to raise the substantive Fourth Amendment issue, the Solicitor General seeks to force the Court to reach the exclusionary rule issue without permitting it the option, as in Gates, of a substantive resolution of the case. This Court, as a prudential matter, should not exercise discretionary review in any Fourth Amendment case in which the government fails to provide it with a full range of dispositional options. Furthermore, where there is no conflict of decision in the circuits, and where there has been such a recent change of policy by the BIA, further consideration of the ramifications of the problem, including an opportunity for INS to collect and analyze data on the impact of the rule on its workload, would enable the issue to receive further study before it is addressed by the Court. See McCray v. New York, No. 82-1381; Miller v. Illinois, 82-

5840; and Perry v. Louisiana, No. 82-5910, 51 U.S.L.W. 3855 (May 31, 1983) (Opinion of Stevens, J., respecting the denial of the petitions for writs of certiorari in jury peremptory challenge cases).

1. For much of this century, it has been assumed by federal courts, federal enforcement officers, and immigration law practitioners that the exclusionary rule applies in deportation proceedings. Sixty years ago, on the only occasion this Court has had to comment on the question, it stated in dictum that "[i]t may be assumed that evidence obtained by the [Labor] Department through an illegal search and seizure cannot be the basis of a finding in deportation proceedings." United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 155 (1923). The federal courts which have squarely confronted the question have all held that evidence illegally obtained by

federal agents is inadmissible in subsequent deportation proceedings.^{8/} Other courts have assumed that the rule applies in their discussions of underlying Fourth Amendment issues.^{9/} Until 1979, the INS itself

^{8/} Lopez-Mendoza and Sandoval-Sanchez v. INS, 705 F.2d 1059 (9th Cir. 1983), petition for cert. filed, No. 83-491 (September 22, 1983); Wong Chung Che v. INS, 565 F.2d 166 (1st Cir. 1977); Ex parte Jackson, 263 F.110, 112-13 (D. Mont.), appeal dismissed sub. nom. Andrews v. Jackson, 267 F. 1022 (9th Cir. 1920) (district court granted writ of habeas corpus to an alien held for deportation, stating that "the deportation proceedings [were] unfair and invalid, in that they [were] based on evidence and procedure that violate the search and seizure and due process clauses of the Constitution"); United States v. Wong Quong Wong, 94 F.832 (D. Vt. 1899) (relying on Boyd v. United States, 116 U.S. 616 (1886), in which evidence obtained in violation of the Fourth Amendment was excluded from quasi-criminal forfeiture proceeding, the district court reasoned that the "constitutional safeguards [of the Fourth Amendment] would be deprived of a large part of their value if they could be invoked only for preventing the obtaining of such evidence, and not for protection against its use").

^{9/} E.g. Huerta-Cabrera v. INS, 466 F.2d 759, 761 n.5 (7th Cir. 1972); Yam Sang Kwai v. INS, 411 F.2d 683, 690 (D.C. Cir. 1969),

"accepted and applied the rule . . . for many years and in countless cases since the dictum in U.S. ex rel. Bilokumsky v. Tod. . . ."
Matter of Sandoval, 17 I. & N. Dec.70,93 (Applemen, Bd. member, dissenting). Consistent with this state of affairs, a leading immigration law treatise observed that "[i]t is undisputed . . . that the Fourth Amendment's prohibition against unreasonable searches and seizures applies in deportation proceedings, and that evidence obtained as the result of the unlawful search

cert. denied, 396 U.S. 877 (1969) (Wright, J., dissenting) ("[I]n my view the statement was the fruit of an [illegal] seizure. . . , and should not have been admitted."); Klissas v. INS, 361 F.2d 529 (D.C. Cir. 1966); Vlissidis v. Anadell, 262 F.2d 398, 400 (7th Cir. 1959). More recently, courts have viewed the issue as an open question, but have not reached the issue because of underlying Fourth Amendment holdings that the evidence was lawfully obtained, e.g., Babula v. INS, 665 F.2d 293, 301 n.4 (3d Cir. 1981) (Adams, J., concurring); Carnejo-Molina v. INS, 649 F.2d 1145, 1149 n.3 (5th Cir. 1981).

cannot be used."^{10/}

2. The court below correctly applied the analytical framework established in United States v. Janis. In Janis, the Court declined to apply the exclusionary rule in a federal civil tax proceeding involving an intersovereign violation of the Fourth Amendment where state criminal law enforcement officials seized evidence in reliance on a defective warrant. This case, in contrast, involves not only an intrasovereign violation, but also an intraagency violation, where the evidence was obtained for use by the INS in the officer's "zone of primary interest." United States v. Janis, 428 U.S. at 455 n.31, 458. The connection between those who illegally obtained the evidence and those who seek to

^{10/} 1A C. Gordon and H. Rosenfield, Immigration Law and Procedure §5.2c at 5-31 (rev. ed. 1977).

use it in a subsequent proceeding could not be more direct.^{11/} The offending officer and the agency which uses the evidence share a common goal and purpose, and the deterrent impact of invoking the rule in deportation proceedings is accordingly "substantial and efficient." See United States v. Janis, 428 U.S. at 453; see also United States v. Calandra, 414 U.S. 338, 348 (1974); Tirado v. Commissioner of Internal Revenue, 689 F.2d 307, 310 (2d Cir. 1982), cert. denied,

^{11/} The INS is responsible not only for apprehending deportable aliens and initiating proceedings against them, but also for adjudicating their entitlement to remain in the country. Moreover, Administrative Procedure Act provisions that insulate agency employees responsible for adjudication from supervision or direction by employees carrying out investigative and prosecutorial functions, 5 U.S.C. §554(d)(2), have been held inapplicable to INS adjudications. See Marcello v. Bonds, 349 U.S. 302, 305-10 (1955). Recently, INS adjudicative functions have been reorganized under a newly created office, the Executive Office for Immigration Review, under the Associate Attorney General's supervision. See 48 Fed. Reg. 8038-39, 8056-57 (February 25, 1983).

U.S. _____, 75 L.Ed.2d 484, 103 S.Ct. 1256 (1983). The government itself concedes that application of the rule may deter immigration agents from committing Fourth Amendment violations. (Pet. at 21).

The government's petition instead focuses on two criticisms of the court's analysis below: 1) that the social costs from applying the exclusionary rule to deportation proceedings are greater than the court of appeals acknowledged (Pet. at 14-20); and 2) that there is no demonstrated need for such a "severe measure." (Pet. 20-26). Upon examination, however, these criticisms are undermined by the government's less-than-candid failure to acknowledge that until recently, the INS operated under a regime in which the exclusionary rule was thought to apply. The government's abstract and greatly exaggerated discussion of practical effects of the rule's application

is strong indication that past INS experience under the rule does not in fact document the speculative fears the government now relies on.

The government first points to the social cost of "freeing an illegal alien and allowing him to perpetuate his unlawful presence in this country," labelling it a judicial "licensing of continuing unlawful conduct."^{12/} (Pet. at 13). No such grant of immunity from immigration laws results from application of the rule. This Court has declined to adopt a "per se" or "but for" rule that would make inadmissible any evidence which comes to light through a chain

^{12/} Entering the United States without inspection is a misdemeanor, 8 U.S.C. §1325. It is an offense which is completed at the time of entry, and is not a continuing one so as to toll the statute of limitations. E.g., United States v. Rincon-Jimenez, 595 F.2d 1192 (9th Cir. 1979); see also United States v. Cores, 356 U.S. 405, 408 n.6 (1958).

of causation that began with an illegal arrest. Brown v. Illinois, 422 U.S. 590, 603 (1975) ("The workings of the human mind are too complex and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test.") At any time, INS may proceed in deportation proceedings with untainted evidence, even in the same proceeding in which other, tainted evidence has been suppressed. Contrary to the government's assertion (Pet. at 15, n.8), INS has frequently been able to sustain its burden of showing that other evidence of deportability remains untainted by the official misconduct.^{13/}

^{13/} See Matter of Sandoval, 17 I. & N. Dec. 70, 93 (BIA 1979) (Applemen, Bd. member, dissenting) ("As the majority notes, the Board has often pointed to untainted evidence in cases involving this issue, as the basis for its decision, and has refused to rely on evidence which might be flawed by a Fourth Amendment violation."); see also, e.g., Carnejo-Molina v. INS, 649 F.2d 1145, 1148-49 (5th Cir. 1981).

Even if some few illegal aliens go free, the number of aliens freed by application of the rule in the past has been inconsequential, statistically insignificant. 705 F.2d at 1071. These few have not unduly burdened the enforcement system.^{14/} Furthermore, they remain subject to the immigration laws, and may be apprehended and

^{14/} The government cannot seriously maintain that the social cost of releasing a criminal who preys on individuals or society is less than the cost of releasing an alien apprehended while going about his or her work. Furthermore, contrary to the government's assertion, the few aliens who may go free as a result of the court's decision cannot be said to pose a collective economic threat to this country. (Pet. at 14 n.7). Indeed, commentators have recently questioned the assumption that the presence of the entire class of undocumented aliens poses a threat to the country's economic well-being. As noted in Developments in the Law: Immigration Policy and the Rights of Aliens, 96 Harv.L.Rev. 1286, 1443 (1983), "on balance, undocumented aliens probably benefit the economy -- a fact that may account for Congress' failure to take strong action against their presence." See also Plyler v. Doe, 457 U.S. 202, 228 (1982).

deported through use of untainted evidence, just as are other members of this "shadow population." See Plyler v. Doe, 457 U.S. 202, 218 (1982). INS often receives tips from reliable informants who are ex-spouses, landlords, neighbors or co-workers, and uses this information to apprehend undocumented aliens. The fact that the undocumented alien was previously the subject of an unlawful arrest, and made admissions which were suppressed, does not act as a bar to any subsequent proceeding untainted by the former one.

The more far-reaching cost, the government claims, is damage to the immigration litigation system which will result from merely allowing suppression motions to be brought. The government emphasizes the summary nature of most deportation proceedings and argues that any significant intrusion of complex

constitutional questions will "overload the system to the point of breakdown." (Pet. at 18). Contrary to the assumption implicit in such an argument, however, refusal to apply the exclusionary rule will not eliminate suppression motions from the litigation process. This Court long ago held that an alien who has succeeded in entering the country possesses a right to a hearing on the issue of deportability which must comport with Fifth Amendment guarantees of due process.^{15/} Accordingly, the BIA permits inquiry into allegations of Fifth Amendment violations and excludes evidence where circumstances surrounding an arrest or interrogation would render admission "fundamentally unfair." See Matter of Toro,

^{15/} See, e.g., Bridges v. Wixon, 326 U.S. 135, 154 (1945); Kaoru Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86 (1903); Wong Wing v. United States, 163 U.S. 228, 242 (1895) (Field, J., concurring).

17 I. & N. Dec. 340, 343 (BIA 1980); Matter of Garcia, 17 I. & N. Dec. 319, 321 (BIA 1980); see also In re Rosa Ramira-Cordova, A21 095 659 (BIA Feb. 21, 1980) (INS officers seized evidence in violation of Fourth Amendment in manner so egregious as to offend the Fifth Amendment's due process requirements of fundamental fairness). Elimination of Fourth Amendment suppression motions has not and cannot significantly reduce the burdens and delays the system already faces and has coped with in the past.^{16/}

^{16/} In 1979, 966,137 aliens accepted voluntary departure, while only 25,888 were deported after formal hearings. Staff of Select Comm'n on Immigration and Refugee Policy, U.S. Immigration Policy and The National Interest, App. G at 73 (1981). There are incentives for waiving a hearing built into the system, especially if the alien wishes to reenter the country. A deported alien is barred from reentry unless he or she obtains the express consent of the Attorney General. Reentry without such consent is a felony. Immigration and Naturalization Act of 1952 (INA) §276, 8.

Next, taking a position essentially foreclosed by its decision not to seek review of the court's resolution of underlying Fourth Amendment claim, the government attempts a "back door" challenge to that holding. As this Court noted in United States v. Janis, 428 U.S. at 443, however, "the issue of admissibility of evidence in violation of the Fourth Amendment is determined after, and apart from the violation." On the present record, the government cannot now argue, as it erroneously attempts to do in its petition,

U.S.C. §1326.

The vast majority of undocumented aliens apprehended by INS are not represented by counsel, and many choose voluntary departure because they are not familiar with their rights under U.S. law. The alien's right to counsel in civil deportation proceedings extends only to counsel retained at no expense to the government. See 8 U.S.C. § 1252(b)(2); 8 C.F.R. § 292.1. Thus, contrary to the government's conjecture, it is highly unlikely that suppression motions in deportation proceedings will become as common as they presently are in criminal cases. (Pet. at 18).

that "application of the exclusionary rule to a case like the present . . . one is not likely to 'deter' official misconduct, since it appears that none in fact occurred." (Pet. at 22). Having failed to seek review of the Fourth Amendment holding in Sandoval-Sanchez, this argument is unavailable.^{17/}

^{17/} There were significant violations of the Fourth Amendment in this case. We note that in any event the government's argument depends, in essence, on the creation of unprecedented constitutional authority for the INS to detain persons during factory or other workplace raids without particularized suspicion that any of the persons seized are actually present in this country illegally. See, e.g., Brief for the American Civil Liberties Union as Amicus Curiae in INS v. Delgado, No. 82-1271 (dated November 12, 1983). That issue, raised in Delgado, was not addressed by the court below and is not before the Court in this case. The court below rested its Fourth Amendment holding on the unlawfulness of the detention at the time Sandoval was interrogated at the police station.

Without citation of authority, the government also maintains that in a suppression hearing the "burden is placed upon the government to prove as to each individual alien that the discovery if his or

In fact, the government's failure to seek review of whether a Fourth Amendment violation took place in these cases is a transparent attempt to manipulate the decisional options open to the Court. As the Court made clear in Janis, the Court must be free to decide whether a substantive Fourth

her illegal status was not preceded by an illegal stop or arrest." (Pet. at 23). In an analogous criminal setting, however, this Court has stated that for purposes of the Fourth Amendment, one seeking to suppress evidence which is allegedly the product of an illegal search or arrest bears the burden of producing evidence that the search or arrest was in fact illegal. See, e.g., Rawlings v. Kentucky, 448 U.S. 98, 104-105 (1980); Nardone v. United States, 308 U.S. 338, 341 (1939). This rule had been adopted for use in deportation hearings prior to 1979. Matter of Sandoval, 17 I. & N. Dec. 70, 97 (Applemen, Bd. member, dissenting) ("In the past the Board has demanded an acceptable nonfrivolous offer of proof as a minimum."); Matter of Tsang, 14 I. & N. Dec. 294 (BIA 1973). Once illegality is shown, the burden then shifts to the government to show that the connection between the lawless conduct and the discovery of the challenged evidence has become, under Wong Sun v. United States, 371 U.S. 471, 488 (1963), "so attenuated as to dissipate the taint." See Brown v. Illinois, 422 U.S. at 603-04.

Amendment violation has taken place before considering whether and to what extent the exclusionary rule operates in a given setting. See also Illinois v. Gates, supra (resolving substantive Fourth Amendment issue). In seeking to deliberately by-pass the Court's ability to consider the substantive Fourth Amendment issue, the government is improperly seeking to limit the Court's decisional options, rendering a denial of certiorari particularly appropriate in this case.^{18/}

Finally, the court below properly rejected as both unrealistic and unacceptable the alternatives to the exclusionary rules suggested by INS. The government in its petition now urges a combination of

^{18/} This is the second occasion this term in which the Solicitor has attempted in this way to force this Court's hand. See United States v. Leon, No. 82-1771, petition for cert. granted, 51 U.S.L.W. 3919 (June 27, 1983).

alternatives, with injunctive actions the primary remedy, backed-up by internal discipline, and the suppression by immigration judges of evidence seized through flagrant or intentional unlawful conduct, and supplemented by damage actions by citizens against individual INS agents.^{19/} These remedies have been used in the past to supplement the application of the exclusionary rule. However, these methods cannot by themselves be effective in deterring Fourth Amendment violations. See Stewart, The Road to Mapp v. Ohio and Beyond: The Exclusionary Rule in Search-and-Seizure Cases, 83 Colum.L.Rev.1365, 1386-1389 (1983).

As Justice Stewart has recognized,

^{19/} The government concedes, as it must, that undocumented aliens, particularly if they have been deported, are not likely to bring damage suits. See Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). (Pet. at 25 n.19).

equitable and standing prerequisites render injunctive relief extremely difficult to obtain even when violations may be flagrant or widespread. See City of Los Angeles v. Lyons, ____ U.S. ____, 75 L.Ed.2d 675, 103 S.Ct. 1660 (1983). Even if such hurdles can be overcome, the proof required to obtain an injunction presupposes that broad scale violations of rights have already occurred. See International Ladies Garment Workers Union v. Sureck, 681 F.2d 624 (9th Cir. 1982), cert. granted sub. nom. INS v. Delgado, ____ U.S. ____, 75 L.Ed.2d ____, 103 S.Ct. 1872 (1983); Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976), modified en banc, 548 F.2d 715 (1977). Accordingly, an injunction can be obtained only after the deterrence mechanism has failed.

Reliance on internal discipline requires self-policing, a laudatory goal, but one

which in the experience of other law enforcement agencies is rarely effective in deterring Fourth Amendment violations. It also depends in large part on the efficient reporting of complaints to INS by those citizens and undocumented aliens whose rights have been violated. Few of those who are deported are likely to make such complaints. Moreover, without a realistic reporting structure or system of incentives, few citizens or resident aliens are likely to pursue such complaints with the INS.

Reliance on suppression of evidence under a Fifth Amendment due process rationale for Fourth Amendment violations merely begs the question. If the exclusionary rule were applied for evidence seized in violation of Fourth Amendment rights, a due process rationale would be superfluous. It also reaffirms the compelling need for continued application of the rule in this context.

INS makes no showing, nor could it, that any of these suggested alternatives are realistic or viable. The petition does not confront the holding of the en banc majority which rejected these same alternatives. Evidentially INS has no factual basis for demonstrating that the alternatives are more than hypothetical; yet surely if they are, INS can document them in any petition at a later date. Absent such documentation, the argument based on alternatives does not provide any reason to grant the petition.

4. In sum, contrary to the government's assertions, application of the exclusionary rule in deportation proceedings does not break new legal ground. Until 1979, immigration agents functioned on the assumption that evidence they obtained in violation of the Fourth Amendment could not be used to prove illegal alienage. Reaffirmation of the rule's applicability

will not significantly impair the investigative or prosecutorial functions of the INS.^{20/}

The court below correctly applied the approach adopted in Janis, which permits selective application of the rule in civil cases where the deterrent benefit outweighs the social cost of invoking the rule. The court carefully considered the costs and benefits of applying the rule, and concluded that "the best and indeed the only realistic way to ensure that immigration officers respect the precious values embodied in the

^{20/} As observed by the court below, past history demonstrates that application of the rule will not unduly burden INS: "The 200,000 deportation cases successfully prosecuted between 1971 and 1979, the millions of voluntary departures during the same period, and the paucity of cases terminated because of Fourth Amendment violations belie such a notion. We simply cannot believe that our confirmation of this historic view that the exclusionary rules applies in deportation proceedings will seriously impede the INS in the discharge of its statutory duties." 705 F.2d at 1075.

Fourth Amendment is to apply the exclusionary rule in deportation proceedings." 705 F.2d at 1075. Whatever the solution to the pressing problem of illegal immigration, it does not lie in judicial abandonment of Fourth Amendment values.^{21/}

^{21/} See, e.g., United States v Ortiz, 422 U.S. 891, 915 (1975) (White, J., concurring) ("Perhaps the Judiciary should not strain to accommodate the requirements of the Fourth Amendment to the needs of a system which at best can demonstrate only minimal effectiveness as long as it is lawful for business firms and others to employ aliens who are illegally in the country.")

CONCLUSION

The petition for a writ of certiorari
should be denied.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ADAN LOPEZ-MENDOZA AND ELIAS SANDOVAL-SANCHEZ

ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

BRIEF FOR THE PETITIONER

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QUESTION PRESENTED

Whether the Fourth Amendment's exclusionary rule should be extended to civil deportation proceedings.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

No. 83-491

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ADAN LOPEZ-MENDOZA AND ELIAS SANDOVAL-SANCHEZ

*ON WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT*

BRIEF FOR THE PETITIONER

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 1a-94a) is reported at 705 F.2d 1059. The opinions of the Board of Immigration Appeals and the immigration judges (Pet. App. 97a-116a) are not reported.

JURISDICTION

The judgments of the court of appeals (Pet. App. 95a, 96a) were entered on April 25, 1983. On July 15, 1983, Justice Rehnquist extended the time within which to file a petition for a writ of certiorari to and including September 22, 1983. The petition was filed on that date and was granted on January 9, 1984 (J.A. 203). The jurisdiction of this Court is invoked under 28 U.S.C. 1254 (1).

STATEMENT

Respondents sought to avoid deportation on the ground that their admissions of illegal alienage, which were used

against them at their deportation hearings, were the fruits of unlawful arrests and should have been suppressed. On petitions for review of their deportation orders (consolidated by the court of appeals), the Ninth Circuit held, in a seven to four decision,¹ that the exclusionary rule applies in civil deportation proceedings. Concluding that respondent Sandoval-Sanchez had been arrested in violation of the Fourth Amendment and that the only evidence supporting his deportability had been obtained as a result of the unlawful arrest, the court of appeals suppressed that evidence and reversed Sandoval's order of deportation. Because the legality of respondent Lopez-Mendoza's arrest had not been determined in the administrative deportation proceedings, the court vacated the deportation order against him and remanded his case to the Board of Immigration Appeals for determination of the Fourth Amendment issue.

1. Respondent Lopez was arrested in 1976 by Immigration and Naturalization Service (INS) agents at his place of employment in San Mateo, California. The investigators had received a tip about the employment of illegal aliens there (J.A. 15-16), and they went to that location, which appeared to be a transmission repair shop (J.A. 17), for the purpose of interviewing the persons named by the informant (J.A. 18, 23, 28-29). They arrived shortly before 8:00 a.m. (J.A. 54). One agent approached the proprietor and stated the purpose of their visit (J.A. 18). The proprietor would not allow his employees to be interviewed during working hours, and he suggested that the agents return during the lunch hour (J.A. 41). The agents knew from experience, however, that if they left the shop, no illegal aliens would be there when they returned (J.A. 35-36, 52).

To avoid a confrontation with the proprietor, one agent approached Lopez, who was standing some distance away

¹ The court decided *sua sponte* to hear the cases before an en banc panel. See Rule 25 of the Rules of the United States Court of Appeals for the Ninth Circuit.

(J.A. 23). The agent first identified himself in English but received no response. The agent then identified himself in Spanish, inquired where Lopez was from, how he had entered the United States, whether he had papers, and whether he had any family in this country (J.A. 20, 36). Lopez answered the questions voluntarily (J.A. 37, 45). Had he refused to answer, the agent simply would have terminated the interview (*ibid.*). Lopez's answers disclosed that he was an undocumented alien with no family ties in this country (J.A. 20-21, 28).² Because of his lack of family ties and the consequent risk of his absconding, Lopez was taken into custody as an illegal alien (J.A. 28). Subsequently, Lopez executed an affidavit admitting his Mexican nationality and his illegal entry into this country (J.A. 99-101).

On the basis of Lopez's admissions, the immigration judge found him deportable, but granted him the privilege of voluntary departure (Pet. App. 99a).³ The immigration judge found it unnecessary to pass on Lopez's claim that he had been unlawfully arrested, stating that "the mere fact of an illegal arrest has no bearing on subsequent deportation proceedings" (*id.* at 98a).

The Board of Immigration Appeals (BIA or Board)⁴ dismissed Lopez's appeal (Pet. App. 100a-103a), concluding that Lopez's claim that he had been illegally arrested was irrelevant (*id.* at 102a):

² The information provided by Lopez was memorialized in a document called a "Record of Deportable Alien" (Form I-213), which was introduced into evidence before the immigration judge (Pet. App. 101a).

³ By accepting "voluntary" departure, an alien is relieved of the legal constraints that attend any attempted lawful reentry by one who has been previously deported. See 8 U.S.C. 1182(a)(17) (aliens who have been deported are "ineligible to receive visas and shall be excluded from admission into the United States").

⁴ The BIA is an agency of the Department of Justice that is separate from the INS. See 8 C.F.R. 3.1. The Board exercises powers delegated by the Attorney General, who retains discretionary authority to review its decisions. See 8 C.F.R. 3.1(h).

We reject the notion that an unlawful arrest can somehow transform an alien's unlawful presence in the United States into a right to remain.

The Board also rejected Lopez's claim for invocation of the exclusionary rule, noting that it had thoroughly considered that issue in a prior case (*Matter of Sandoval*, 17 I. & N. Dec. 70 (BIA 1979) (J.A. 163-202))⁵ and had there concluded (Pet. App. 102a-103a):

[A]doption of the [exclusionary] rule in deportation proceedings would [not] offer any significant deterrent to misconduct to an immigration officer who would otherwise intentionally violate an individual's Fourth Amendment rights in the hope of assisting in that alien's deportation. * * * [T]he potential benefit of the rule does not justify the societal cost of its application and * * * other means of deterring immigration officers from unlawful conduct are available.

2. Respondent Sandoval was arrested in 1977 at his place of employment, a potato processing plant in Pasco, Washington.⁶ INS Agent Bower and other officers went to the plant, with the permission of its personnel manager, to check for illegal aliens (J.A. 127, 137). While some of the officers stationed themselves at the exits, Bower and a uniformed Border Patrol agent entered the plant (J.A. 128). Because a shift change was occurring, they went first to the lunchroom, then through the plant area, and finally to the main entrance (J.A. 128, 129). As soon as they entered the lunchroom, they identified themselves as immigration officers (J.A. 133). Their appearance caused confusion—many people in the lunchroom rose and either headed for the exits or milled around; others in the plant area left their equipment and

⁵ For convenience, the Board's decision in *Matter of Sandoval*, *supra*, is reproduced in the Joint Appendix at pages 163-202.

⁶ Respondent Sandoval is not the same individual who was involved in *Matter of Sandoval*, *supra*, in which the Board held the exclusionary rule ordinarily inapplicable to deportation proceedings.

started running; and many of those who were entering the plant turned around and started walking back out (J.A. 129-130).

The two officers eventually stationed themselves at the main entrance to the plant. As employees passed, the officers looked for those who averted their heads, avoided eye contact, or tried to hide themselves in a group. They addressed those individuals in English, with innocuous questions. The conversations were terminated if the individuals responded in English. Those who could not respond in English and who by their actions aroused Agent Bower's suspicions, based on his experience as an immigration investigator, were questioned in Spanish as to their right to be in the United States. J.A. 133-134.

Agent Bower testified that it was "very probable" that he, and not his partner, had questioned Sandoval at the plant, but that he could not be "absolutely positive" (J.A. 135, 136). The alien whom he thought he remembered as Sandoval had been "very evasive"—the individual had averted his head, turned around, and walked away when he saw Agent Bower (J.A. 137, 138). Agent Bower was certain that no one was questioned about his status unless his actions had given the officers reason to believe that he was an undocumented alien (J.A. 140).

Thirty-seven illegal aliens, including Sandoval, were briefly detained at the plant and later transported to the county jail for processing (J.A. 129, 131). At the jail, about one-third of the aliens availed themselves of the privilege of voluntary departure, and they were immediately put on a bus to Mexico (J.A. 141). Those, including Sandoval, who elected to exercise their right to a deportation hearing were questioned further. During this questioning, Agent Bower reduced to writing (on a Form I-213) Sandoval's admission of unlawful entry (Pet. App. 6a).

Based on the written record of Sandoval's admissions, the immigration judge found him deportable (Pet. App. 104a-109a). The immigration judge considered and re-

jected Sandoval's claim that he had been unlawfully arrested and, in the alternative, held that an illegal arrest "does not tend to negate the validity of a deportation hearing" (*id.* at 107a, 108a). Despite the fact that this was Sandoval's second entry without inspection, the immigration judge, as a matter of administrative discretion, granted his alternative request for voluntary departure (*id.* at 108a-109a).

The BIA dismissed Sandoval's appeal (Pet. App. 110a-113a). Reviewing the entire record, including Sandoval's own testimony, the Board concluded that the circumstances of his arrest had not affected the voluntariness of his recorded admission (*id.* at 112a). The Board also again declined to invoke the exclusionary rule (*id.* at 112a-113a).

3. The court of appeals reversed Sandoval's deportation order and vacated and remanded Lopez's deportation order (Pet. App. 1a-94a). Six members of the panel, in an opinion written by Judge Norris, held that Sandoval's admission was the fruit of an unlawful arrest and that the exclusionary rule, which was held applicable to deportation proceedings, required suppression of the evidence (Pet. App. 1a-37a). Judge Goodwin, in a special concurring opinion (*id.* at 38a), agreed that, "for better or for worse," the exclusionary rule applies to deportation proceedings, but noted that he joined in the finding of a Fourth Amendment violation in Sandoval's case only "[u]nder the compulsion of *Intern. Ladies' Garment Workers', Etc. v. Sureck*, 681 F.2d 624 (9th Cir. 1982), which is the law of this circuit, but with which I disagreed * * *." ⁷ Lopez's deportation order was vacated

⁷ The majority, citing *International Ladies Garment Workers' Union v. Sureck*, 681 F.2d 624, 634-643 (9th Cir. 1982), cert. granted *sub nom. INS v. Delgado*, No. 82-1271 (Apr. 25, 1983) (argued Jan. 11, 1984), and noting that "Officer Bower could not remember Sandoval or describe his behavior" (Pet. App. 7a), questioned whether there was "the requisite individualized suspicion of illegal alienage to justify even a brief *Terry* stop of Sandoval" (*ibid.*). Nevertheless, the majority did not decide that issue, con-

and his case remanded to the BIA to determine whether there had been a Fourth Amendment violation.

Adopting the analytical framework set forth in *United States v. Janis*, 428 U.S. 433 (1976), the majority concluded that the benefits of applying the exclusionary rule in civil deportation proceedings out-weighed the costs. On the "benefit" side, the majority opined that the "deterrent impact of invoking the rule in deportation proceedings will be 'substantial and efficient'" (Pet. App. 25a (footnote omitted) (quoting *Janis*, 428 U.S. at 453)) because the allegedly illegal evidence is used by the same agency whose officers obtain it and because "there are no other applications of the exclusionary rule which effectively deter the offending officers from violating the Fourth Amendment"—for example, reliance on the deterrence that could be obtained by suppressing evidence only in criminal immigration prosecutions was thought to be inadequate because the evidence was not likely to have been obtained with such criminal prosecutions in mind. Pet. App. 22a-24a. The majority also rejected *Bivens* ac-

cluding instead that "the dispositive question is * * * the lawfulness of [Sandoval's] detention at the time he was interrogated at the jail" (*ibid.*). The court held that by the time of Sandoval's interrogation at the police station, "the initial stop had clearly ripened into an arrest" (*ibid.*) and that the "furtive behavior" observed by Agent Bower (which the court treated as the only basis for the officer's decision to detain Sandoval) constituted insufficient probable cause to support an arrest (*id.* at 8a).

In his special concurring opinion, Judge Goodwin noted simply that he did "not believe that a 'Terry Stop' in a work place where the immigration officers have a right to be necessarily ripens into an unlawful seizure on the facts of this case" (Pet. App. 38a).

In a special dissenting opinion, Judge Poole argued that probable cause was established when, after being questioned in Spanish, the suspected aliens "answered and conceded alienage and also illegal entry" (Pet. App. 92a). Judge Poole also noted that the "record as a whole shows that all of the persons to whom questions were addressed first in English and then in Spanish had exhibited some behavior which preceded the questioning," that Sandoval "was among those asked in Spanish whether 'they had papers' " and that "[h]e had none" (*ibid.*).

tions, injunctive relief, and internal agency discipline, finding them inadequate alternatives to application of the exclusionary rule (Pet. App. 33a-35a).

On the other side of the balance, the majority found the societal costs of suppression to be negligible. It opined that the only real cost to be considered was the number of illegal aliens who will successfully avoid deportation and concluded that that number "will not appreciably increase the number of illegal aliens in our midst" (Pet. App. 27a).

Judge Alarcon, joined by Judges Wright, Wallace, and Poole, dissented from the majority's holding on the exclusionary rule issue (Pet. App. 39a-85a). Judge Wright also wrote a separate opinion specially concurring in the principal dissenting opinion (*id.* at 86a-90a), and, as previously noted (see page 7 note 7, *supra*), Judge Poole separately dissented from the majority's conclusion that Sandoval had been unlawfully arrested (Pet. App. 91a-94a).

On the exclusionary rule issue, the principal dissent argued that there was nothing in the record "from which it can be reasonably inferred that immigration officers routinely conduct unreasonable searches and seizures," nor were there "any facts that would support an inference that extending the exclusionary rule to civil deportation proceedings would act as a significant deterrent to present INS practices" (Pet. App. 46a). Hence, the dissent was of the view that the court had "created a remedy for which there is no demonstrated need" (*ibid.*).⁸ Judge Wright, in his separate dissent, was willing to assume that there might "be a deterrent effect if the rule

⁸ The dissent also accused the majority of reaching "out beyond the record" because "neither [respondent] timely moved to suppress evidence on fourth amendment grounds" (Pet. App. 45a). The majority held, however, that respondents' motions to "terminate" their deportation proceedings should be treated as motions to suppress (*id.* at 2a-3a n.1). We have not sought review of the majority's conclusion that respondents made at least the functional equivalent of suppression motions in these cases.

were applied in deportation proceedings because these proceedings are within immigration officers' zone of primary interest" (*id.* at 87a). After noting the costs associated with the exclusionary rule, however, he expressed the view that "[t]hese are not cases in which the manner of seizing evidence was so egregious as to call for the deterrent impact of the rule" (*id.* at 89a).

On the cost side, the principal dissent noted that, under the "fruit of the poisonous tree" concept, suppression could well immunize an alien perpetually from deportation despite his continuing violation of the immigration laws (Pet. App. 48a-49a). Moreover, requiring suppression hearings in deportation proceedings "could result in protracted interruption of the proceedings, and may seriously impede enforcement of our nation's immigration laws" (*id.* at 72a). Thus, the dissent took issue with the majority's decision to limit its consideration of the costs of applying the exclusionary rule in deportation proceedings to the additional number of illegal aliens that might be expected to escape deportation (*id.* at 74a-75a):

The impact of the rule on deportation proceedings is not so much that the illegal alien population will increase—indeed it does so every year despite heightened enforcement policies. Rather, the impact of the rule on civil deportation proceedings must be measured against the number of motions to suppress that will be made—not the number of constitutional challenges that are meritorious. This is the potential injury to the deportation proceeding that must be weighed in the balancing process.

The dissent then concluded that this cost would be excessive (Pet. App. 77a). Finally, the dissent was of the view that INS's stringent procedures for disciplining officers who conduct illegal searches and seizures made application of the exclusionary rule to deportation proceedings unnecessary (*id.* at 78a-82a).

INTRODUCTION AND SUMMARY OF ARGUMENT

By extending the exclusionary rule to civil deportation proceedings, convened solely for the purpose of determining whether an alien has the right to be in the United States, the court of appeals has sanctioned a continuing violation of the law by freeing an illegal alien and allowing him to perpetuate his unlawful presence in this country. This licensing of continuing unlawful conduct is unparalleled in our jurisprudence, for although the suppression of evidence in a criminal prosecution often amounts to a grant of immunity for *past* criminal conduct, so too does the expiration of a statute of limitations, the granting of a pardon, or the granting of immunity by a prosecutor. But it is unprecedented for the judiciary to create rules of evidence or procedure that directly facilitate the commission of *continuing* unlawful conduct.

The reversal of respondent Sandoval's deportation order, moreover, does more than simply offend society's notions of justice and judicial integrity. The court of appeals' extension of the exclusionary rule to civil deportation proceedings will have severe practical effects: It threatens grave injury to the enforcement of our immigration laws and may create a new class of aliens whose only documentation is a judge's opinion suppressing evidence—and it does so at a time when the Legislative and Executive Branches are attempting to regain control over the nation's borders and stem the flood of aliens unlawfully entering and residing in the United States.

The suppression rule, after all, is not constitutionally mandated, but is a judicially created remedy designed to deter unlawful police conduct. See, e.g., *United States v. Calandra*, 414 U.S. 338, 347-348 (1974). The determinative question, therefore, is not whether the protections of the Fourth Amendment extend to deportable aliens discovered in this country—a proposition we do not contest—but whether it is appropriate to permit illegal aliens to invoke the exclusionary rule in civil deportation proceedings in order to perpetuate their unlawful presence in the

United States. We submit that it is not, and that this Court should dismantle the Ninth Circuit's new "barrier[] to law enforcement [created] in the pursuit of a supervisory role that is properly the duty of the Executive and Legislative Branches." *United States v. Janis*, 428 U.S. 433, 459 (1976).

A. Not since *Mapp v. Ohio*, 367 U.S. 643 (1961), has this Court extended the exclusionary rule to an entirely new category of cases. It is well to bear in mind, however, that there are certain fundamental distinctions between the situation confronting the Court in *Mapp* and the cases now before the Court. The decision in *Mapp* was reached essentially as a matter of last resort, only after the Court concluded, based on the experience of the states in the years following *Wolf v. Colorado*, 338 U.S. 25 (1949), that less drastic remedies had failed. Here, by way of contrast, there is neither evidence of widespread Fourth Amendment violations by immigration officers nor any indication that those occasional violations that do occur can be materially reduced by addition of the suppression sanction to the array of alternative training and deterrent mechanisms already in place. Moreover, the Court's task in assessing the efficacy of the alternative deterrents is greatly simplified here, where it is the activities of a single federal agency, rather than those of every state and local police department in the country, that are under scrutiny. The available evidence indicates that INS already is taking all reasonable measures to ensure compliance by its officers with the Fourth Amendment and that the additional sanction of the exclusionary rule is neither needed nor likely to provide a measurable increment of deterrence.

B. Nothing in the Fourth Amendment or any other provision of the Constitution either directly or implicitly provides for the exclusion of illegally seized evidence from criminal trials, let alone administrative deportation hearings. Instead, decisions of this Court over the last two decades have made it clear that the exclusionary rule,

first enunciated in *Weeks v. United States*, 232 U.S. 383 (1914), and later extended to the states in *Mapp*, is a judicially-created remedy, the paramount and perhaps sole purpose of which is the deterrence of unlawful police conduct. See, e.g., *Calandra*, 414 U.S. at 348; *Desist v. United States*, 394 U.S. 244, 254 n.24 (1969). For that reason, the Court has recognized that it makes sense to apply the rule only to those situations in which its deterrent purpose will in fact be significantly advanced. *Calandra*, 414 U.S. at 348.

Although the nature of the proceeding is not the controlling inquiry, it is certainly relevant, in undertaking a cost-benefit analysis of the exclusionary rule's applicability to deportation proceedings, to bear in mind that "[i]n the complex and turbulent history of the rule, the Court has never applied it to exclude evidence from a civil proceeding, federal or state." *Janis*, 428 U.S. at 447 (footnote omitted). This is so because the need for deterrence, and hence the rationale for the rule, is strongest in criminal cases. See *Calandra*, 414 U.S. at 348. Deportation proceedings, although they carry important consequences, have always been regarded as civil matters. Their sole purpose is to determine an alien's right to remain in this country, not to punish for the commission of a crime.

C. In our submission, a reasoned cost-benefit analysis demonstrates that the court of appeals erred in extending the exclusionary rule to civil deportation proceedings. Preliminarily, however, we suggest that this is a situation ill-suited to a strictly even-handed weighing of costs and benefits. By excluding unquestionably relevant evidence, the exclusionary rule operates in precisely the opposite manner from what we demand of other rules of evidence. Thus, its benefits should not simply be presumed; they must, instead, be convincingly demonstrated if they are to overcome the indisputable costs. Accordingly, the exclusionary rule cannot rationally be extended to deportation proceedings on the basis of nothing more than speculation that it *might* produce some benefit.

Such drastic medicine must be reserved for cases in which it is demonstrably likely to satisfy a proven need.

D. The societal costs of extending the exclusionary rule to deportation proceedings are excessive. First, the exclusion of oral admissions of alienage is likely to result in a de facto grant of resident status and immunity from the immigration laws to persons not entitled to be in this country. Because the vast majority of deportable aliens enter this country without inspection, it is highly unlikely that INS will have in its files other, untainted evidence sufficient to support a finding of deportability. In these circumstances, INS may never be able to proceed against an alien who has once reaped the windfall benefits of suppression. In practical effect, therefore, the court of appeals' decision is akin to judicial sanction for the suppression of an alien's "body," a result this Court has unequivocally rejected in the criminal context. See *United States v. Crews*, 445 U.S. 463 (1980).

Second, application of the exclusionary rule to deportation proceedings carries heavy systemic costs that threaten to bring the administrative and judicial deportation process to a virtual halt. The staggering workload of the immigration judges is manageable only because deportability is usually conceded. But the windfall benefits of suppression, resulting in the termination of deportation proceedings, cannot help but serve as an irresistible incentive to raise suppression motions, whether meritorious or not. The longer an alien can delay his departure from this country, the more likely it is that he may never be forced to leave. Thus, proceedings that are intended to be essentially summary in nature will now involve complex constitutional questions that befuddle even the most experienced jurists. It is manifest that the deportation process cannot cope with such a radical change absent a massive infusion of additional resources.

Finally, proper enforcement of the immigration laws would be severely hampered by the decision below. Effective immigration enforcement requires deployment of the limited available personnel in a manner that is likely to

produce nearly simultaneous arrests of relatively large numbers of individuals, such as those resulting from factory or farm surveys. Officers conducting such arrests cannot realistically be expected to maintain the type of detailed, individualized records that are routine in the criminal field. Although the officers can testify that they followed certain procedures, they generally will be unable to recall in detail the specifics of any particular arrest or group of arrests—as demonstrated by Agent Bower's testimony regarding the apprehension of respondent Sandoval. To avoid suppression of the only evidence supporting deportability, INS agents, no matter how scrupulously they have adhered to the dictates of the Fourth Amendment, will thus be compelled to adopt investigative and record-keeping methods that will enable them to provide detailed, individualized testimony at subsequent suppression hearings. In addition, a considerable portion of each officer's time will have to be devoted to attendance at suppression hearings rather than field operations. Inevitably, these changed procedures will severely reduce the number of arrests that can be made, even though the lawfulness of the general investigative operations is not in question.

E. The exclusionary rule's ability to deter unlawful police conduct has always been a matter of conjecture—intuitively plausible in the context of criminal investigative activities, but nevertheless unproven. See, e.g., *Stone v. Powell*, 428 U.S. 465, 492 & n.32 (1976); *Janis*, 428 U.S. at 449-453; *Elkins v. United States*, 364 U.S. 206, 218 (1960). Because the rule's effectiveness is a matter of speculation, there is no justification for applying it to a whole new class of proceedings in the absence of both a proven pattern of abuse requiring such a drastic "remedy" and a comparably strong "intuitive" basis for supposing that it will afford a meaningful increment of deterrence of unlawful conduct. The court of appeals was forced to acknowledge, however, that there is no evidence of widespread Fourth Amendment violations by immigration officers (Pet. App. 28a). Thus, as the dis-

sent complained, the court of appeals "has created a remedy for which there is no demonstrated need" (*id.* at 46a).

The cases before the Court highlight another serious problem that is likely to sap the deterrent sanction of much of its potential force. There is no evidence in either case that the alien was in fact subjected to an illegal seizure. The illegality in respondent Sandoval's case, for instance, was simply presumed on the basis of Agent Bower's inability to remember with certainty the details of the encounter. But application of the exclusionary rule to conduct that was probably *lawful* is hardly likely to contribute significantly to the deterrence of illegal conduct.

Moreover, it is unrealistic to suppose that immigration officers will be particularly responsive to the suppression sanction. Such officers typically arrest hundreds of deportable aliens each year and are not likely to be greatly influenced by the possibility that one or even several of their arrests might be held unlawful and thereby block deportation; their "investment" in any particular case pales in comparison to what might be expected of police officers conducting criminal investigations, who may make five or ten arrests per year. In addition, the disincentive to illegal conduct that can be anticipated from the suppression remedy is greatly diluted in the immigration context, because the officer knows in advance that most apprehended aliens will in any event accept voluntary departure rather than challenge their arrest. In these circumstances, an immigration officer is likely to be far more responsive to internal constraints, such as disciplinary sanctions, than to the possible suppression of evidence.

F. Finally, the court of appeals gave insufficient weight to the existing, and apparently quite successful, means of curbing Fourth Amendment violations by INS officers: thorough training in the requirements of the Fourth Amendment, an administrative practice of excluding evidence seized through intentionally or flagrantly unlawful

conduct, comprehensive and effective internal disciplinary measures, the availability of injunctive relief, and damages suits. With these mechanisms already in place, and no evidence to demonstrate that they are not working reasonably well, any increased benefit to be derived from application of the exclusionary rule cannot justify the heavy costs previously described.

In sum, the court of appeals has reached out for the most severe "remedy," in the absence of any proof of a problem requiring correction or amenable to correction by such means, and in the face of overwhelming costs that cannot be ignored. The court utterly failed to provide the justification required for the "drastic measure" (*Janis*, 428 U.S. at 459) it has imposed on the immigration system.

ARGUMENT

THE EXCLUSIONARY RULE SHOULD NOT BE EXTENDED TO CIVIL DEPORTATION PROCEEDINGS

A. The Exclusionary Rule Is A Remedy Of Last Resort And Should Not Be Extended To An Entirely New Class Of Cases Absent Persuasive Evidence That Such A Severe Measure Is Required

1. Before undertaking the now familiar cost-benefit analysis employed by the Court when it considers the appropriateness of applying the exclusionary rule to particular categories of cases,⁹ it is well to bear in mind that there are certain fundamental distinctions between the situation now before the Court and previous cases in which the Court has considered the need for the exclusionary rule. Not since *Mapp v. Ohio*, 367 U.S. 643 (1961), in which the Court held that the exclusionary rule enunciated in *Weeks v. United States*, 232 U.S. 383 (1914), was equally applicable to state criminal prosecutions, has the Court extended the rule to an entirely new

⁹ See generally Brief for the United States at 34-38, *United States v. Leon*, cert. granted, No. 82-1771 (June 27, 1983) (argued Jan. 17, 1984). We have furnished respondents' counsel with copies of that brief.

class or category of cases.¹⁰ The situation confronting the Court in *Mapp* was, however, markedly different from the situation now before the Court. Not only did the facts in *Mapp* show a particularly flagrant violation

¹⁰ Respondents' contrary contention notwithstanding (see Br. in Opp. 18), the question presented in this case is the "extension" of the exclusionary rule to deportation proceedings, rather than its "retention" in such proceedings. Although some courts have assumed that the rule always has applied to deportation proceedings, in fact the issue has received virtually no administrative or judicial attention in the past. In *Matter of Sandoval*, 17 I. & N. Dec. at 75 n.7 (J.A. 170), the BIA explained that it "ha[d] not previously intended to reach the issue decided today and withdraws from any language which may be read as suggesting otherwise." The BIA also noted that there were few judicial decisions addressing the issue and none that had engaged in "a detailed analysis of the relative merits of excluding such evidence from deportation proceedings" (17 I. & N. Dec. at 75; J.A. 170). Thus, the BIA determined to give the issue fresh consideration (17 I. & N. Dec. at 75; J.A. 171):

Accordingly, as the Board has not previously resolved this issue, as we find only one contemporary Federal Court decision in which unlawfully seized evidence is specifically held to be excludable, and as we find no decision in which the appropriateness of applying the rule in deportation proceedings is analyzed in detail, we will address the question as one of first impression.

The single federal court decision referred to by the BIA is *Wong Chung Che v. INS*, 565 F.2d 166 (1st Cir. 1977). There, without analysis, the court held that the exclusionary rule should be applied in a deportation proceeding to suppress *physical* evidence obtained as a result of an illegal arrest. The court suggested, however, that it would not follow the same rule in the case of oral statements (565 F.2d at 168-169), which are what is at issue in the present cases.

This Court itself clearly has not decided the issue presented today. In *United States ex rel. Bilokumsky v. Tod*, 263 U.S. 149, 155 (1923), the Court stated in dictum that "[i]t may be assumed that evidence obtained by the [Labor] Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings." On the merits, however, the Court rejected Bilokumsky's claim that unlawfully obtained evidence had been used against him (*ibid.*). Moreover, other language in the opinion suggests that the Court would not have invoked the exclusionary rule

of Fourth Amendment rights in an individual case, but, even more importantly, the Court was confronted with the generic conclusion that its decision in *Wolf v. Colorado*, 338 U.S. 25 (1949), to entrust to the states the manner of enforcement of the Fourth Amendment's guar-

even if it had found an illegality (*id.* at 157 (footnotes omitted; citations omitted; emphasis added)):

So far as appears, there was nothing in the circumstances under which Bilokumsky was examined which would have rendered his answer inadmissible even in a criminal case. * * * And since deportation proceedings are in their nature civil, the rule excluding involuntary confessions could have no application. Moreover, a hearing granted does not cease to be fair, merely because rules of evidence and of procedure applicable in judicial proceedings have not been strictly followed by the executive; or because some evidence has been improperly rejected or received. To render a hearing unfair the defect, or the practice complained of, must have been such as might have led to a denial of justice, or there must have been absent one of the elements deemed essential to due process.

And, as the principal dissenting opinion below noted (Pet. App. 54a), this Court later observed, without reference to *Bilokumsky*, that, "[a]ccording to the uniform decisions of this Court deportation proceedings are not subject to the constitutional safeguards for criminal prosecutions." *Abel v. United States*, 362 U.S. 217, 237 (1960).

The only other judicial decisions to have confronted squarely the issue now before this Court are *Ex parte Jackson*, 263 F. 110, 112-113 (D. Mont.), appeal dismissed, 267 F. 1022 (9th Cir. 1920), and *United States v. Wong Quong Wong*, 94 F. 832 (D. Vt. 1899). As the principal dissenting opinion below explained in considerable detail (Pet. App. 49a-52a), neither of those cases contains any critical analysis of the issue, and certainly neither purports to follow the cost-benefit approach to exclusionary rule questions that this Court has employed for nearly two decades. It is worth noting, however, that *Ex parte Jackson*, *supra*, rests not on the Fourth Amendment exclusionary rule alone, but instead on a conclusion that the challenged search rendered the deportation proceedings "unfair and invalid" (263 F. at 112) under the Due Process Clause of the Fifth Amendment. As we explain later (see pages 41-42, *infra*), the BIA follows the same approach today to ensure that deportation proceedings are fundamentally fair.

antees had not worked.¹¹ The Court concluded that the factual considerations that had supported the decision in *Wolf* were no longer valid, noting in particular that, in the intervening years between *Wolf* and *Mapp*, many of the states had voluntarily adopted their own exclusionary rules (367 U.S. at 651). The Court was especially influenced by the experience of California, whose supreme court had been "compelled [to adopt an exclusionary rule] . . . because other remedies have completely failed to secure compliance with the constitutional provisions" *People v. Cahan*, 44 Cal. 2d 434, 445, 282 P.2d 905, 911 (1955)" (367 U.S. at 651). The Court added that "[t]he experience of California that such other remedies have been worthless and futile is buttressed by the experience of other States" (*id.* at 652).

In short, the Court reached the result it did in *Mapp* as a decision of last resort, and only after concluding that other, less drastic approaches had failed to curb widespread abusive police practices. Here, by way of contrast, there is neither evidence of widespread Fourth Amendment violations by immigration officers nor any indication that those isolated violations that do occur can be materially reduced by adding a suppression remedy to the comprehensive array of alternative training and deterrence mechanisms already in place.

Equally important, the Court in *Mapp* was faced with devising a remedy that would promote conscientious adherence to the Fourth Amendment's commands by every

¹¹ In *Wolf*, the Court held that while the guarantees of the Fourth Amendment are enforceable against the states through the Due Process Clause of the Fourteenth Amendment, it was nevertheless "not for this Court to condemn as falling below the minimal standards assured by the Due Process Clause a State's reliance upon other methods which, if consistently enforced, would be equally effective" (338 U.S. at 31). The Court added that it could not "brush aside the experience of States which deem the incidence of such conduct by the police too slight to call for a deterrent remedy not by way of disciplinary measures but by overriding the relevant rules of evidence" (*id.* at 31-32).

state and local police force in the country, from the most sophisticated metropolitan police department to the smallest local constabulary. The cases now before the Court, however, involve the operations of a single federal agency. It is therefore a relatively straightforward task for the Court to determine that the Immigration and Naturalization Service already has adopted all reasonable measures to ensure compliance by its officers with the Fourth Amendment, and that whatever additional deterrence might be achieved by application of the exclusionary rule in deportation proceedings is not worth the associated costs.

2. It is by now clearly established that the exclusionary rule "is a judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." *United States v. Calandra*, 414 U.S. 338, 348 (1974) (footnote omitted); see also *United States v. Janis*, 428 U.S. 433, 446 (1976); *Stone v. Powell*, 428 U.S. 465, 486 (1976); *United States v. Peltier*, 422 U.S. 531, 538 (1975). Accordingly, the exclusionary rule "has never been interpreted to proscribe the introduction of illegally seized evidence in all proceedings or against all persons." *Stone v. Powell*, 428 U.S. at 486. Instead, application of the rule has been carefully "restricted to those areas where its remedial objectives are thought most efficaciously served." *Calandra*, 414 U.S. at 348; see also *Janis*, 428 U.S. at 447; *Peltier*, 422 U.S. at 538-539. For these reasons, the Court has long engaged in a cost-benefit analysis when it has confronted suggested expansions of the rule.

In our submission, however, this weighing of costs and benefits is not properly performed on scales that are evenly balanced. By excluding unquestionably relevant evidence, the exclusionary rule operates in precisely the opposite manner from what we generally demand of other rules of evidence. See, e.g., C. McCormick, *Handbook of the Law of Evidence* § 72 (E. Cleary ed. 1972). Thus, the rule's benefits should not simply be

presumed; the rule's application to new situations requires more than an assumption that it *might* have the desired deterrent effect. As the Chief Justice observed in his concurrence in *Stone v. Powell*, 428 U.S. at 499-500 (emphasis in original; citation omitted):

To vindicate the continued existence of this judge-made rule, it is incumbent upon those who seek its retention—and surely its *extension*—to demonstrate that it serves its declared deterrent purpose and to show that the results outweigh the rule's heavy costs to rational enforcement of the criminal law. The burden rightly rests upon those who ask society to ignore trustworthy evidence of guilt, at the expense of setting obviously guilty criminals free to ply their trade.

See also Amsterdam, *Search, Seizure and Section 2255: A Comment*, 112 U. Pa. L. Rev. 378, 389 (1964): “[T]he rule is a needed, but grudgingly [*sic*] taken, medicament; no more should be swallowed than is needed to combat the disease.”

3. These cautionary notes were sounded in the context of the traditional application of the exclusionary rule to criminal prosecutions. While *Janis* teaches that the same cost-benefit analysis that is applied in criminal cases is appropriate in the civil context as well,¹² it is nevertheless important to bear in mind that, “[i]n the complex and turbulent history of the [exclusionary] rule, the Court never has applied it to exclude evidence from a civil proceeding, federal or state.” *Janis*, 428 U.S. at 447 (foot-

¹² In *Janis*, the Court declined to apply the exclusionary rule to bar the use in a federal civil tax proceeding of evidence seized by state law enforcement officials in violation of the Fourth Amendment. Recognizing deterrence as the underlying purpose of the exclusionary rule, the Court compared the costs resulting from application of the rule in the circumstances there presented with the deterrent benefit that could be anticipated and concluded that the expected benefit did not outweigh the societal costs imposed by suppression (428 U.S. at 454).

note omitted).¹³ Instead, the Court has stated that "the need for deterrence and hence the rationale for excluding the evidence are strongest where the Government's unlawful conduct would result in imposition of a criminal sanction on the victim of the search." *Calandra*, 414 U.S. at 348 (footnote omitted); see also *Abel v. United States*, 362 U.S. 217, 237 (1960).

The purpose of a deportation proceeding, on the other hand, is simply to determine an alien's right to remain in this country. Accordingly, deportation proceedings have long been characterized as civil in nature. See *Woodby v. INS*, 385 U.S. 276, 285 (1966). Deportation is "not a punishment for crime," but rather "a method of enforcing the return to his own country of an alien who has not complied with the conditions upon the performance of which the government of the nation, acting within its constitutional authority and through the proper departments, has determined that his continuing to reside here shall depend." *Fong Yue Ting v. United States*, 149 U.S. 698, 730 (1893); see also *Mahler v. Eby*, 264 U.S. 32, 39 (1924) ("[D]eportation, while it may be burdensome and severe for the alien, is not a punishment."); *Bugajewitz v. Adams*, 228 U.S. 585, 591 (1913); *Li Sing v. United States*, 180 U.S. 486, 494-495 (1901). Thus, while we do not contend that the civil nature of a deportation proceeding is controlling, it is clearly a relevant factor for the Court to consider in any cost-benefit analysis of the appropriateness of applying the exclusionary rule to deportation proceedings.

¹³ Although the exclusionary rule has been invoked to exclude illegally seized evidence in a forfeiture proceeding, the Court was careful to note that the object of a forfeiture proceeding, like a criminal proceeding, "is to penalize for the commission of an offense against the law." *One 1958 Plymouth Sedan v. Pennsylvania*, 380 U.S. 693, 700 (1965). Moreover, "[i]t would be anomalous indeed, * * * to hold that in the criminal proceeding the illegally seized evidence is excludable, while in the forfeiture proceeding, requiring the determination that the criminal law has been violated, the same evidence would be admissible" (*id.* at 701 (footnote omitted)). See *Janis*, 428 U.S. at 447 n.17.

4. With these principles in mind, we demonstrate below that the harm resulting from the exclusion of evidence of alienage in deportation proceedings far outweighs any speculative benefit to Fourth Amendment values that could conceivably be obtained through application of the exclusionary rule. Although the court of appeals did employ a cost-benefit analysis, the court went astray in the values it brought to that analysis. As Judge Alarcon's dissenting opinion makes clear (Pet. App. 39a-85a), the majority totally ignored many of the costs of suppression in the deportation context, took a grudging view of the single cost it did consider, and greatly overstated the extent of the incremental deterrence that its decision might promote. More fundamentally, the court of appeals erred in imposing the most drastic possible sanction in the absence of any demonstrated need for such a remedy and in the absence of any persuasive evidence that alternative remedies are inadequate.

B. The Costs Of Applying The Exclusionary Rule To Deportation Proceedings Are Excessive

The societal costs resulting from extension of the exclusionary rule to deportation proceedings are far greater than the court of appeals was willing to acknowledge. The Board of Immigration Appeals detailed those costs in its comprehensive opinion in *Matter of Sandoval*, *supra*. The BIA's analysis clearly reveals that the costs of suppression in the deportation context are higher than our immigration system can afford.¹⁴

¹⁴ The BIA's views are, we submit, entitled to substantial deference. By delegation of authority from the Attorney General (see 8 C.F.R. 3.1(a)(1) and (d)(1)), the Board is the agency charged with the interpretation of the immigration laws. As such, it is intimately familiar not only with the laws it interprets but with the practical needs of the immigration system as well. In light of the exclusionary rule's status as a judicially-created remedy (see page 20, *supra*), the BIA's conclusion that the rule should not be extended to civil, administrative deportation proceedings carries great weight. See, e.g., *Miller v. Youakim*, 440 U.S. 125, 144-145 n.25 (1979) (quoting *Red Lion Broadcasting Co. v. FCC*, 395 U.S. 367,

1. The most obvious result of applying the exclusionary rule in deportation proceedings is that an alien who is not entitled to be in this country may nonetheless remain here indefinitely. *Matter of Sandoval*, 17 I. & N. Dec. at 81; J.A. 178.¹⁵ The effect may be a de facto judicial grant of resident status and immunity from the immigration laws. In contrast, although exclusion of evidence in a criminal proceeding may allow an accused to escape punishment for past crimes, it does not countenance continuation of the illegal conduct in the future.

381 (1969)) (courts accord great deference to the agency responsible for the day-to-day administration of a statute and should reject that agency's views only if "there are compelling indications that [the agency] is wrong"). Judge Alarcon made the same point in the principal dissenting opinion below (Pet. App. 75a): "[T]he BIA's damage assessment should be compelling, as that court, more so than this one, is in a position to anticipate the cost to the system in which it functions."

¹⁵ The court of appeals' suggestion that this is not a serious cost, because illegal aliens may not be threatening individually or criminally dangerous (Pet. App. 31a), is misguided. This Court has itself noted that, collectively, illegal aliens pose a substantial economic threat to this country and to the citizens and lawful resident aliens against whom they compete for employment. See, e.g., *De Canas v. Bica*, 424 U.S. 351, 356-357 (1976) ("Employment of illegal aliens in times of high unemployment deprives citizens and legally admitted aliens of jobs; acceptance by illegal aliens of jobs on substandard terms as to wages and working conditions can seriously depress wage scales and working conditions of citizens and legally admitted aliens * * *"); *United States v. Brignoni-Ponce*, 422 U.S. 873, 878-879 (1975) ("[T]hese [illegal] aliens create significant economic and social problems, competing with citizens and legal resident aliens for jobs, and generating extra demand for social services."). Respondents' contention (Br. in Opp. 32 n.14) that illegal aliens "probably benefit the economy" not only runs counter to this Court's pronouncements but also disregards Congress's judgment (in an area in which its powers are "more complete" than any other (*Fiallo v. Bell*, 430 U.S. 787, 792 (1977) (citation omitted) that an "open door" immigration policy is contrary to the national interest. Even if respondents' views are sociologically and economically sound, it is for Congress, not the courts, to reexamine the wisdom of the laws providing for deportation of illegal aliens.

The likelihood of a de facto "adjustment of status" is quite real. Contrary to the lower court's facile suggestion that aliens who successfully invoke the exclusionary rule can be reapprehended and deported by the use of untainted evidence (Pet. App. 32a n.21), the matter is not that simple. First, and most obvious, is the fact that once aliens are discharged from a deportation proceeding, they may never be apprehended again. And even if they are, it may well be impossible to prove that the new evidence of their deportability is not tainted by the evidence that has been previously suppressed. Unlike the situation with respect to aliens who overstay their visas, INS has no records concerning the vast majority of aliens who have entered without inspection (see *id.* at 28a). Thus, a reapprehended alien is likely to be known to INS only because of the Service's prior apprehension of him. In the vast majority of cases, as the court of appeals itself appeared to recognize (*id.* at 24a-25a n.13), it is highly unlikely that INS's files will reveal anything about the alien, much less untainted evidence necessary for a new deportation proceeding. As Board Member Farb explained in his concurring opinion in *Matter of Sandoval*, 17 I. & N. Dec. at 85 (emphasis added) (J.A. 183-184):

For Fiscal Year 1977, the Immigration and Naturalization Service reported that it had located 1,042,000 deportable aliens. Of these, 939,000, or 90%, were listed as having entered without inspection. That means that for the vast majority there was no reason to expect that the Immigration and Naturalization Service records contained prior evidence of their identity as aliens. I am not condoning or encouraging violation of Fourth Amendment rights in the immigration investigator's search for solid proof of identity. If it were done deliberately, discharge from Government service would be appropriate. *I simply don't see how we can reasonably bar the use of illegally obtained convincing proof that a person is an alien with no right of presence, when that may be all that will ever be available to identify him.*

Thus, the practical effect of a suppression order in a deportation proceeding may well be to immunize an illegal alien from ever being deported. Although the court of appeals purported to be ordering suppression only of respondent Sandoval's statements, its judgment reversing the order of deportation was, in reality, akin to suppression of an alien's "body," a result this Court has found unacceptable in criminal cases. See *United States v. Crews*, 445 U.S. 463, 474 (1980); see also *id.* at 477 (Powell, J., concurring); *id.* at 478-479 (White, J., concurring). If respondent Sandoval is ever reapprehended, but does not make a new, untainted statement, a second deportation proceeding would likely be terminated as well, resulting in yet another suppression of his "body" and again permitting him to remain in the United States in violation of the immigration laws.

2. A more serious and far-reaching cost is the damage to the administrative and judicial deportation process that will result from merely permitting suppression motions to be brought. The inevitable consequence will be serious interference with the country's ability to expel the vast numbers of illegal aliens who have entered surreptitiously. In *Matter of Sandoval*, 17 I. & N. Dec. at 80 (J.A. 177), the BIA first hypothesized that this cost might be deemed minimal "in view of the fact that since 1899 we can find only two reported cases in which unlawfully seized evidence was in fact excluded from deportation proceedings and only one other case in which the applicability of [the] rule was specifically addressed." Upon closer analysis, however, the BIA found substantial "hidden" costs. First, it described the costs to "the system" (*ibid.* (footnote omitted)):

Absent the applicability of the exclusionary rule, questions relating to deportability routinely involve simple factual allegations and matters of proof. When Fourth Amendment issues are raised at deportation hearings, the result is a diversion of attention from the main issues which those proceedings were created to resolve, both in terms of the expertise of

the administrative decision makers and of the structure of the forum to accommodate inquiries into search and seizure questions. The result frequently seems to be a long, confused record in which the issues are not clearly defined and in which there is voluminous testimony, but the underlying facts [are] not sufficiently developed. The ensuing delays and inordinate amount of time spent on such cases at all levels has an adverse impact on the effective administration of the immigration laws, which to date (in view of the virtual absence of cases in which evidence has been ultimately excluded) has in no way been counterbalanced by any apparent productive result.

And, referring to the realities of immigration practice, the BIA noted (17 I. & N. Dec. at 80; J.A. 178) :

This is particularly true in a proceeding where delay may be the only "defense" available and where problems already exist with the use of dilatory tactics.

Deportation hearings are conducted before a quasi-judicial administrative forum of special and limited function and expertise. Neither the hearing officers nor the attorneys participating in those hearings are ordinarily well-versed in the considerable intricacies of Fourth Amendment jurisprudence. The proceedings are—and are intended to be—essentially summary. See *Zakonite v. Wolf*, 226 U.S. 272, 275 (1912). Indeed, given the volume of deportation proceedings, most cannot be anything but summary if the system is to continue to operate.¹⁶ The

¹⁶ According to the Office of the Chief Immigration Judge, from March 1983 (the first month for which statistics are available) until December 1983, the 55 authorized immigration judges received 70,202 deportation cases and completed adjudication of 51,277; received 6,078 exclusion cases and completed adjudication of 5,125; and received 1,967 motions to reopen and completed adjudication of 1,857. Annualizing these data, the Chief Immigration Judge projects that there will be 69,910 completed adjudications in a one-year period, or 6.3 adjudications *per day* per immigration judge. (In our Petition (at 17 n.10), we projected a rate of 5.35 adjudications per

staggering workload is manageable only because, as the BIA explained in *Matter of Sandoval*, 17 I. & N. Dec. at 80 n.21 (J.A. 177), "in the majority of cases, deportability is conceded and the bulk of the hearing concerns applications for various categories of mandatory and discretionary relief from deportation." Manifestly, any significant intrusion of "complex constitutional controversies" (Pet. App. 75a) will overload the system to the point of breakdown. Hearings that can now be conducted in an hour or less will take a day or more, and decisions that can now be rendered expeditiously will often require sophisticated and time-consuming research and analysis by the immigration judge.

Moreover, it is unrealistic to expect that there will not be a significant increase in the number of suppression motions made in deportation proceedings if the decision below stands. For an illegal alien, "delay may be the only 'defense' available." *Matter of Sandoval*, 17 I. & N. Dec. at 80; J.A. 178. The longer an alien can postpone a final deportation order, the longer he can remain in this country and hope that something will happen to save him from deportation. The decision below thus compounds the problems attendant upon enforcement of the immigration laws by providing illegal aliens who would otherwise lack even a colorable legal defense to deportation with a potent new

immigration judge per day. That figure was based on certain general assumptions, including a 48-week work year for each immigration judge. The present figure is based on the Chief Immigration Judge's records of time actually worked by each immigration judge and also reflects the fact that until recently not all 55 judgeships were filled.) In addition to the substantive adjudications just noted, immigration judges also handle 16,000 bond hearings each year.

By way of contrast, 6,023 criminal defendants were actually tried in United States District Courts during fiscal year 1982 (*Annual Report of the Director of the Administrative Office of the United States Courts* 141 (1982)) by 484 district judges (*id.* at 34). This averages out to 12.44 criminal trials per year per judge.

strategy for delay.¹⁷ It is not surprising that the immigration bar has quickly latched on to the decision below by increasingly asserting Fourth Amendment claims in suppression motions. In INS's Western Region, which encompasses the States of Arizona, California, Hawaii, and Nevada (see 8 C.F.R. 100.4), a dramatic increase in suppression motions is already apparent. The decision below was rendered on April 25, 1983 (Pet. App. 1a). In the year preceding the decision, INS advises us that 141 suppression motions were filed in deportation proceedings within the Western Region.¹⁸ In the seven months following the decision (from June 1, 1983, through December 31, 1983), INS advises us that 342 suppression motions have been filed in the Western Region.¹⁹ Assuming that such motions continue to be filed at a constant rate for the remainder of the first year following the decision below—undoubtedly a conservative assumption—a total of 586 such motions will be filed, in contrast to the 141

¹⁷ Respondents were arrested on August 3, 1976 (Lopez) (J.A. 15), and June 23, 1977 (Sandoval) (J.A. 162), and both are still in this country because of their Fourth Amendment claims.

¹⁸ These motions were filed between June 1, 1982, and May 31, 1983. This time period was selected for examination because it allowed a one-month "percolation" period for the practicing bar to learn of the court of appeals' decision.

¹⁹ Prior to January 16, 1984, INS did not keep written records of the number of suppression motions filed in deportation proceedings. The number of motions filed in the year preceding the court of appeals' decision and the number filed in the seven months thereafter, noted above in text, were derived from a variety of sources, including examination of open case files, pending appellate briefs before the BIA, and the reconstructive efforts of INS's trial attorneys. The trial attorneys were instructed not to count any case about which they were not absolutely certain. Although the numbers supplied in text thus represent estimates, INS has a high degree of confidence in their accuracy. In addition, the reliability of the estimates is borne out by the one month of written records that INS does have. Between January 16, 1984, and February 15, 1984, 53 suppression motions were filed in deportation cases in the Western Region. This corresponds closely to the estimate that 342 such motions were filed in the seven months following the court of appeals' decision.

motions filed in the year before the decision. Although it is still too early to know the disposition of most of these motions, the indications to date support the hypothesis that they are filed merely for purposes of delay, and not because they have any intrinsic merit. In the San Francisco District Office, for example, we are advised that 100 suppression motions have been filed since the decision below, 30 of those motions have been decided by immigration judges (the first level of the deportation process), and only one motion has been granted.

Moreover, the problem of delay introduced by suppression motions does not cease with the deportation hearing. Although it is too early for the increase in suppression motions to have affected the workload of the BIA or the courts of appeals, it requires little speculation to predict that illegal aliens whose suppression motions are denied by immigration judges will appeal to the BIA and from the BIA to the courts of appeals. Indeed, the federal courts have frequently expressed exasperation at the seemingly endless procedural maneuvering of illegal aliens. See, e.g., *Der-Rong Chour v. INS*, 578 F.2d 464, 467-468 (2d Cir. 1978); *Ballenilla-Gonzalez v. INS*, 546 F.2d 515, 521 (2d Cir. 1976), cert. denied, 434 U.S. 819 (1977) ("[O]ur government should not be forced to tolerate the practice, all too frequently adopted by aliens once they become subject to a deportation order, of using the federal courts in a seemingly endless series of meritless or dilatory tactics designed to stall their departure as long as possible."). During the several years while administrative and judicial appeals from the denial of suppression motions are pending, of course, aliens will be able to remain here notwithstanding the complete absence of any claim of lawful right to be in the United States.²⁰

²⁰ A particularly ironic example of the potential for delay inherent in suppression motions is *Montero v. Ilchert*, No. C-84-0470 (N.D. Cal. filed Jan. 31, 1984). Petitioners in that case were found deportable by an immigration judge, but they were granted the privilege of voluntary departure and permitted five months in which to leave the country. At the end of the five months, petitioners filed

Thus, it is not far-fetched to predict, as the dissent suggested (Pet. App. 72a-73a), that a considerable number of aliens who have hitherto waived hearings and accepted voluntary departure will now assert their right to a hearing solely in order to file such motions.²¹ Not only would these motions add yet another significant source of delay to the deportation process, but they are likely to add substantially to the burdens of the courts that must review such proceedings, as well as leading to the grant of indefinite stays to aliens not entitled to be in this country (see pages 24-26, *supra*). These results we submit, would deal a grave blow to the enforcement of the immigration laws.

3. There is yet another cost of applying the exclusionary rule to deportation proceedings, one whose impact upon enforcement of the immigration laws could considerably outweigh all other costs, substantial as they are. The practical effect of the court of appeals' decision will be to

a motion to reopen their deportation proceedings, alleging that they had been denied effective assistance of counsel because their lawyer—the same attorney who represented respondent Lopez in the instant case—had failed to file a suppression motion in the deportation proceedings. The immigration judge and INS's district director denied petitioners' motion for a stay of deportation pending further proceedings on the motion to reopen. On February 16, 1984, the district court granted the petition for habeas corpus filed in *Montero*, finding that INS had abused its discretion in denying a stay of deportation pending further inquiry into petitioners' claim of ineffective assistance of counsel.

²¹ As an indication of the universe from which additional assertions of the right to a hearing may come, the Border Patrol apprehended 1,106,683 deportable aliens in fiscal year 1983. The projected figures for 1984 and 1985 are 1,262,000 and 1,500,000 apprehensions, respectively (OMB, Exec. Off. of the President, *Budget of the United States Government—Fiscal Year 1985: Appendix*, H.R. Doc. 98-139, 98th Cong., 2d Sess., at I-N16 (1984)). Even at the rate of 6.3 adjudications per immigration judge per day, only 69,910 adjudications will be completed in the one-year period between March 1983 and February 1984 (see pages 27-28 note 16, *supra*). Thus, the ability of the system to function obviously depends on the fact that only a small fraction of apprehended illegal aliens exercise their right to a hearing, as well as the fact that most hearings are relatively brief and uncomplicated.

require substantial modification of the enforcement techniques that have proven to be the most effective in apprehending illegal aliens. As noted earlier, immigration officers apprehend over one million deportable aliens per year. To ensure effective allocation of the agency's limited investigative resources, INS's policy in areas away from the border is to utilize those investigative procedures, such as factory and farm surveys, that are likely to enable a relatively small number of agents to make large numbers of essentially simultaneous apprehensions. See Brief for the Petitioners at 3-5 & n.3, *INS v. Delgado*, cert. granted, No. 82-1271 (Apr. 25, 1983) (argued Jan. 11, 1984). (We have furnished respondents' counsel with copies of our brief in *Delgado*.) One of the factory surveys at issue in *Delgado*, for example, resulted in essentially simultaneous arrests of 78 illegal aliens out of some 300 employees (*id.* at 5). In light of the large number of arrests that an individual officer may make in a single day and the inevitable time lag between the arrest and a deportation proceeding, his recollection of the circumstances of a particular arrest, and even of a particular group of arrests on a single day, will understandably fade with time. Indeed, it seems unlikely that an officer who may have arrested a dozen or more people in the span of a few hours could accurately recollect the facts pertinent to the arrest of each alien even if the deportation hearing were held immediately following the arrests.²² But if probable cause for a particular arrest or reasonable suspicion for a stop is to be made an issue in deportation proceedings, INS will find it necessary as a matter of

²² Added to this is the subtlety and complexity of the Fourth Amendment analysis applicable to these situations, involving initial observations of behavior, contacts between officer and alien that may or may not amount to a Fourth Amendment seizure, and the further development of the interaction leading ultimately to an arrest. One need only look to the same type of issue as it has emerged in the airport drug surveillance cases to appreciate how detailed and subtle the inquiry at a suppression hearing is likely to be. See, e.g., *Florida v. Royer*, No. 80-2146 (Mar. 23, 1983).

litigative precaution to require its officers to compile detailed, contemporaneous, written reports recording the circumstances of each individual arrest.²³ Even if it be assumed that substantial numbers of illegal aliens will continue to depart voluntarily without a hearing, INS agents still would have to make individualized arrest records because they could not know in advance *which* aliens would exercise their right to a hearing. Manifestly, the time consumed in executing detailed, on-the-spot arrest reports will dramatically reduce the number of arrests that can be made.

In addition, it is rarely if ever necessary for the arresting officer to attend the typical deportation hearing, at which deportability is conceded and the only issue is discretionary relief. The officer's only necessary contribution already has been made by completing the I-213 "Record of Deportable Alien" that is introduced to prove the government's case at the deportation hearing. Once suppression becomes an issue, however, the officer must not only be in a position to recount the details of each arrest, but he must also take time away from his regular duties to testify at the suppression hearing. Thus, a certain number of days each month that would otherwise be devoted to the apprehension of deportable aliens will instead be devoted to testifying at suppression hearings. As we demonstrate below, these diversions of INS's limited investigative resources cannot be justified.

²³ Although we have not sought this Court's review of the court of appeals' Fourth Amendment ruling in Sandoval's case, it is worth noting how much emphasis the court placed on the fact that Agent Bower could not be "absolutely positive" (J.A. 136) that he himself had questioned Sandoval (see Pet. App. 5a-7a). There is of course a considerable difference between an actual absence of probable cause to arrest (which we do not concede in these cases) and an agent's inability to recall the exact circumstances of any particular arrest. See pages 35-36, *infra*.

C. There Is Neither A Demonstrated Need For The Sanction Of The Exclusionary Rule In Deportation Proceedings Nor A Realistic Possibility That It Would Produce Meaningful Incremental Deterrence

Even in the criminal context for which the exclusionary rule was first devised, this Court has noted the lack of reliable empirical evidence to support the proposition that the exclusionary rule operates effectively to deter police misconduct. See, *e.g.*, *Stone v. Powell*, 428 U.S. at 492 & n.32; *Janis*, 428 U.S. at 449-453; *Elkins v. United States*, 364 U.S. 206, 218 (1960); *Irvine v. California*, 347 U.S. 128, 136 (1954). Instead, the Court has accepted as intuitively plausible the premise that suppression in a criminal trial is likely to some extent or in some circumstances to deter police officers from committing Fourth Amendment violations. Whatever the validity of that assumption in the context of criminal investigations, it clearly is far less plausible in the context of immigration enforcement. Moreover, the court of appeals itself acknowledged (Pet. App. 28a) that there is no evidence of widespread Fourth Amendment violations by immigration officers; nevertheless, it reached out to apply the exclusionary rule to all deportation proceedings in the future. This rush to judgment, in the absence of convincing evidence of need, cannot be squared with the much more cautious approach taken by this Court to suggested expansions in the scope of the exclusionary rule.

1. The absence of a demonstrated need to invoke the exclusionary rule is particularly striking here, where it is not at all clear that any Fourth Amendment violations actually occurred. In respondent Lopez's case, the Fourth Amendment issue has yet to be determined, but the administrative record seems quite adequate to demonstrate that an admission of alienage was made during a non-seizure encounter, and accordingly that there was no violation's of Lopez's Fourth Amendment rights.³⁴ Yet the

³⁴ It is debatable whether the agents' continued presence on the premises at the time of their conversation with Lopez violated

result of the court of appeals' ruling is that a known illegal alien who was apprehended nearly eight years ago is given another round of hearings, to be followed by the inevitable appeals, that will allow him to remain in this country for several more years. And in respondent Sandoval's case, the most that can be said is that the court of appeals *presumed* that the Fourth Amendment had been violated because Agent Bower could not recall the precise circumstances surrounding Sandoval's detention and arrest. But as noted by Judge Poole in dissent (Pet. App. 92a), the record in Sandoval's case, fairly read, reveals that the only aliens transported to the police station were those who admitted their unlawful alienage at the plant. If Agent Bower had been able to testify that he specifically recalled Sandoval's having made such an admission, clearly there would have been probable cause to arrest (see page 33 note 23, *supra*). Application of the exclusionary rule to a case like Sandoval's, therefore, is not likely to "deter" official misconduct, since it appears that none in fact occurred. Instead, the result will be limited to undermining lawful and effective investigative techniques, thereby severely interfering with enforcement of the immigration laws (see pages 31-33, *supra*). Thus, even conceding the validity in general of the deterrence rationale and its potential applicability to INS agents, the exclusionary rule is not likely to perform its desired function in the type of case here presented.

It is well to keep in mind in this connection the contrast between the practical circumstances surrounding the decision to stop or arrest and the legal rules governing adjudication of suppression motions. A majority of arrests of illegal aliens away from the border occur during farm, factory, or other workplace surveys. See Brief for the Petitioners at 3-4 & n.3, *INS v. Delgado*, *supra*. As is evident from the record regarding the circumstances attending the arrest of respondent Sandoval,

the rights of the proprietor, but that issue is immaterial to Lopez's claim for suppression.

a single workplace survey can result in the apprehension of large numbers of illegal aliens, occurring under conditions that can only be described as chaotic. In order to safeguard the rights of individuals present at such surveys, some of whom may be citizens or lawfully present aliens, INS has developed various rules restricting stop, interrogation, and arrest practices. See, *e.g.*, *id.* at 7 n.7, 32-40 & n.25. There is no evidence that INS agents do not generally abide by these regulations, or, indeed, that they did not do so in these cases.

But when it comes time to conduct a suppression hearing the burden is placed upon the government to prove as to each individual alien that the discovery of his or her illegal status was not tainted by an illegal stop or arrest. Cf. 3 W. LaFare, *Search and Seizure* § 11.2, at 499 (1978). Given the often large number of illegal aliens arrested in the frequently chaotic circumstances surrounding a factory or farm survey, reconstruction of the particular observations that prompted the agents to detain or arrest each individual is indeed an awesome, if not impossible, task. The agents can testify that they follow the general rules—*i.e.*, that they do not detain anyone without reasonable suspicion of illegal alienage and that they do not arrest anyone unless there is an admission of illegal alienage or other strong evidence thereof—but plainly the Ninth Circuit, at least, is unwilling to rely upon such general testimony or upon any presumption of regularity to sustain the lawfulness of the stop or arrest. It prefers instead to rely on a presumption of illegality that must be rebutted by detailed, specific, individualized proof of the circumstances of the arrest.

The result of this combination of factual and legal circumstances—so different from the focused investigative activities usually under scrutiny in a suppression hearing in a criminal case—is that there will usually not in fact have been any Fourth Amendment violation attendant upon the securing of the admissions of illegal alienage upon which deportability frequently depends,

yet it will often be impossible to prove this with the required degree of individualized specificity. Application of the exclusionary rule to deportation proceedings will thus result principally in the exclusion of *lawfully* obtained evidence—as most probably has happened in respondent Sandoval's case. But if the suppression sanction is to be applied mainly to lawful actions of immigration officers, it plainly will be a completely ineffective means of deterring misconduct.

2. It is of course true that immigration officers are in the business of conducting searches for and seizures of illegal aliens for the purpose of bringing about their deportation. And, being human, they inevitably will make mistakes on occasion, no matter how carefully trained and how well intentioned they may be. Moreover, as the court of appeals noted (Pet. App. 23a-24a), while the investigative activities of the police are likely to culminate in a criminal trial, those of INS agents are directed primarily toward deportation. On the basis of these observations, the court of appeals concluded that extension of the exclusionary rule to deportation proceedings can be expected to have the same deterrent impact on illegal searches and seizures by INS agents as its current application in criminal trials is presumed to have on criminal investigators. This assumption simply fails to pass scrutiny.

First, as discussed in the preceding point, the nature of INS investigative activities is materially different from typical police investigations, so that it is normally a great deal more difficult to determine reliably whether the arrest of an alien resulted from a Fourth Amendment violation than to make the same determination in the case of the arrest or search of a criminal suspect. But the effectiveness of the suppression sanction very much depends on the ability of the courts to apply it consistently to illegal conduct and *only* to illegal conduct. Frequent application of the sanction to conduct that was not illegal can only sow confusion, not teach a meaningful corrective lesson.

Even were it possible to apply the sanction with surgical precision in deportation proceedings, critical differences between INS and conventional police activities remain that make it most unlikely that extension of the exclusionary rule to deportation proceedings will provide a meaningful incremental deterrent to misconduct. For example, the sheer volume of arrests made by an individual immigration officer not only presents the practical problems already discussed, but it also greatly reduces the likelihood that suppression in any individual case will have great impact on the officer. INS informs us that an immigration officer averages 489 arrests of deportable aliens each year. By way of contrast, each field agent of the Drug Enforcement Administration arrests an average of 8 persons per year. It may be quite reasonable to assume that the possibility that one of his eight arrests might not be successfully prosecuted because of his own misconduct is likely to play some part in the DEA agent's thinking. For the immigration officer, on the other hand, the possibility that one or even several aliens will not be deported because of the exclusionary rule, when hundreds more will, cannot possibly have a comparable impact.

Moreover, the incentives to gather crucial evidence are obviously strongest in a serious criminal investigation. As the incentives to gather evidence increase, it may be logical to assume that the need for external disincentives to illegal conduct, such as the exclusionary rule, become stronger. In the immigration context, however, where considerably less is at stake in each individual case, there is correspondingly less incentive to engage in overzealous law enforcement practices. By the same token, officers know that the great majority of deportable aliens they arrest will not demand deportation hearings in any event, thereby greatly diluting the potential deterrent from application of the exclusionary sanction in those proceedings.²⁵ Thus, application of the exclusionary rule in de-

²⁵ As the court of appeals noted (Pet. App. 29a n.17), fewer than 2.5% of the deportable aliens apprehended each year exercise their

portation proceedings is unlikely to have any significant behavioral impact on the practices of immigration officers. Instead, this is a situation in which internal constraints, discussed below, are likely to be much more effective.

D. The Court Of Appeals Failed To Give Sufficient Weight To The Availability Of Other Means To Reduce Or Discourage Fourth Amendment Violations

The court of appeals cavalierly dismissed the utility of less drastic remedies for Fourth Amendment violations committed by INS officers. In the circumstances of this case, in which the court was forced to acknowledge that there is no record of widespread violations to be deterred, the court clearly erred. The alternatives are many, and, either singly or in combination, there is no reason to suppose that they are inadequate or that the addition of a suppression remedy will provide a meaningful increment of control over potential illegal conduct. The existing alternatives include comprehensive legal training for immigration officers, an administrative practice of excluding evidence seized through intentionally or flagrantly unlawful conduct, effective internal discipline, the availability of declaratory or injunctive relief, and damages suits.

1.a. New immigration officers go through extensive training in a variety of subjects. A new officer's first 18 weeks with INS are spent at the Border Patrol Academy in Glynco, Georgia. There, he is required to take 126 hours of study in the Law Program, which includes instruction in all aspects of Fourth Amendment and statutory law affecting the work of immigration officers. He must pass the final examination in the Law Program with a grade of at least 70; failure to attain that grade

right to a formal hearing. Although we have explained (see pages 26-31, *supra*) the systemic damage that would result from even a small increase in the number of aliens requesting hearings, the fact remains that the individual officer still would know that most of his apprehensions would not lead to hearings, thereby diluting the potency of the suppression sanction.

results in immediate separation from the Border Patrol. Following his training at the Academy, the officer remains in a probationary status for the remainder of his first year with the Border Patrol. He is assigned to a field office, where he spends one full day per week in formal classroom instruction in law and Spanish, under the supervision of a Training Officer specially assigned to him. During the rest of the week, he is assigned to work under the supervision of experienced (journeymen) officers on rotating shifts so as to obtain a broad range of field experience. After he has been with the Border Patrol for approximately six months, he is required to take another pass/fail examination in law; again, failure to achieve a grade of at least 70 results in immediate separation. Even after passing his six-month examination, he remains in training as before, continuing to take formal classroom instruction one day per week. Ten months after joining the Border Patrol, he takes a final examination in law, on which he must again receive a passing grade of 70. At the end of his first year with the Border Patrol, he is promoted to journeyman status if he has passed all his examinations and been recommended for promotion by the supervisory officers under whom he has worked.

Journeymen officers return to the Border Patrol Academy periodically for refresher courses in the law. In addition, INS's Office of General Counsel sends out teletypes to all field offices advising them of new court decisions that affect their work as soon as notice of the decisions is received. These teletypes are read to the officers at roll call each day, so that officers are informed as rapidly as possible of new legal requirements. In short, INS does everything reasonably possible to ensure that its officers are well-versed in the requirements of the Fourth Amendment.

b. A fact overlooked by the court of appeals is INS's general policy of erring on the conservative side when confronted with questionable search and seizure issues. INS has instructed its officers as follows (INS, U.S.

Dep't of Justice, *The Law of Arrest, Search, and Seizure for Immigration Officers* at iv (Jan. 1983) :

Many of these areas of the law are in flux and have not yet been settled by the Supreme Court. * * * In these areas, the Service sometimes adopts a nationwide policy which does not test the limit of the law or the Constitution but is in conformity with one or more lower court decisions. * * * The reasons for adopting this policy are the following:

* * * * *

(2) *Protection of officers and the agency.* If our policy is somewhat more restrictive than the Constitutional limit, or if it does not test that limit where that limit has not yet been determined by the Supreme Court, our officers are less likely to be involved in litigation over alleged violations of persons' Constitutional rights (*Bivens* suits). Also, such suits are less likely to be brought, saving the Department, the agency, and the individual employee the expense, time, and anguish which such litigation entails.

(3) *Image.* By conforming our actions nationwide to the requirements laid down by lower courts and not always exercising our authority to its very limits and testing those limits, a higher proportion of our contacts with citizens and lawful permanent residents will be in a non-confrontation setting. We should therefore be able to demonstrate to the public, the courts, and the media that the agency acts reasonably and with commendable restraint in the face of overwhelming enforcement responsibilities.

2. The Department of Justice requires that evidence seized through intentionally unlawful conduct be excluded, as a matter of policy, from the proceeding for which it was obtained.²⁶ In addition, the BIA has held,

²⁶ This policy arose out of former Attorney General Civiletti's consideration of the BIA's decision in *Matter of Sandoval*, *supra*. The Attorney General had been requested to review the Board's decision in that case pursuant to 8 C.F.R. 3.1(h), which reserves to the Attorney General discretionary authority to review any BIA

subsequent to its decision in *Matter of Sandoval*, *supra*, that evidence will be excluded if the circumstances surrounding a particular arrest and interrogation would render admission of the evidence thereby obtained "fundamentally unfair" and in violation of "the fifth amendment's due process requirement * * *." *Matter of Toro*, 17 I. & N. Dec. 340, 343 (BIA 1980). Similarly, in *Matter of Garcia*, 17 I. & N. Dec. 319, 321 (BIA 1980), the Board suppressed an admission of alienage obtained after the alien's requests to speak to his attorney had been repeatedly refused and he had been held incommunicado for a significant period of time. Because the unlawfully obtained admission was the only evidence of deportability, the BIA ordered the deportation proceeding terminated (*ibid.*). The Board reached the same result in *In re Ramira-Cordova*, No. A21-095-659 (BIA Feb. 21, 1980), after concluding that the only evidence of deportability was obtained as a result of a middle-of-the-night, warrantless entry into the aliens' residence.

The Board's approach represents a balanced response to the problem of Fourth Amendment violations committed by INS officers. As the Board recognized in *In re Ramira-Cordova*, *supra*, evidence of deportability should be admitted so long as it is probative and its use funda-

decision. After consideration by the Department's Office of Legal Counsel and members of the Attorney General's staff, the Attorney General decided not to review the BIA's decision, concluding that it was correct as a matter of law and in conformity with existing Department policy. Nevertheless, the Attorney General took the opportunity to clarify the Department's internal policy with respect to Fourth Amendment violations. The result was a directive forbidding the use of evidence seized through intentionally unlawful conduct and providing that employees who commit such violations are to be subjected to the most severe administrative penalties available. The directive also addresses reckless and negligent violations of the Fourth Amendment and establishes appropriate disciplinary sanctions for such violations. See Memorandum from Benjamin R. Civiletti to Heads of Offices, Boards, Bureaus and Divisions, *Violations of Search and Seizure Law* (Jan. 16, 1981). (A copy of this memorandum has been lodged with the Court and served on counsel for respondents.)

mentally fair. See also *Martin-Mendoza v. INS*, 499 F.2d 918, 921 (9th Cir. 1974) ("The tests for admissibility [in deportation proceedings] are fundamental fairness and probativeness."). Not every Fourth Amendment violation (or, as in respondent Sandoval's case, not every presumed Fourth Amendment violation) necessarily requires a finding that the admission of evidence thereby obtained would render the proceedings fundamentally unfair. In light of the costs to the immigration system previously described, the Board's approach clearly represents a reasonable reconciliation of competing interests, and it should be endorsed by this Court.

3. As described in the principal dissenting opinion (Pet. App. 78a-81a), INS has a "comprehensive procedure" for investigating and punishing immigration officers who commit Fourth Amendment violations. "[W]hether or not any civil or criminal proceedings are commenced" against such an officer, "he may be subject to agency disciplinary action with possible penalties ranging from an official letter of reprimand to removal from his job, which may bar him from future federal employment." INS, U.S. Dep't of Justice, *The Law of Arrest, Search, and Seizure for Immigration Officers* 35 (Jan. 1983) (footnote omitted). All INS employees are required to "report[] immediately" any allegations of misconduct directed against other employees, and failure to report such allegations, or even delay in reporting them, "may result in disciplinary action against [nonreporting] employees." *INS Operations Instructions* ch. 287.10(e) and (g), at 4723, 4730 (1978). The pendency of an allegation of misconduct "made by, on behalf of, or involv[ing] an alien" requires the immediate suspension of any action "to enforce the departure from the United States of either the alien or of any witnesses involved until a preliminary inquiry or an investigation of the matter has been completed" (*id.* ch. 287.10(f)(5), at 4730). Thus, no alien

may be deported while his charges of a Fourth Amendment violation are under investigation.²⁷

As the principal dissent recognized, the panoply of INS disciplinary measures is impressive and deserving of deference from the courts (Pet. App. 80a.) :

It is readily apparent from reviewing the Immigration and Naturalization Service's disciplinary procedure that a sincere effort is being made to deter and punish search and seizure violations. A police officer who conducts an unreasonable search and seizure may suffer anguish when a criminal defendant goes free because of the blunder. He does not, however, face the immediate prospect of unemployment as a result of the exclusion of illegally seized evidence. An immigration officer on the other hand, faces loss of his job and denial of future federal employment if he conducts an illegal search and seizure. These stern consequences should serve as a far greater deterrent to improper conduct than the possibility that deportation proceedings against an alien may be dismissed. No evidence has been cited to this court that these harsh disciplinary measures proved ineffective.

The majority dismissed these procedures, which it nevertheless described as "commendable," because it had "no evidence whatsoever that the guidelines are being consistently and effectively enforced" (Pet. App. 35a). The majority's approach was backward—it should have ascertained that the disciplinary procedures are *not* capable of controlling any tendency immigration officers might other-

²⁷ Significantly, however, the "stay" of deportation that may accompany INS's investigation into a charge of misconduct does not result in the substantial delays associated with suppression motions. INS's disciplinary procedures contain strict time limits for the completion of investigations. Preliminary inquiries, which may be all that are required to resolve many cases, must be completed within 10 working days. *INS Operations Instructions* ch. 287.10(j) (3), at 4733-4734 (1978). More detailed investigations must be completed within 60 days, and extensions of time may be granted only for "compelling" reasons (*id.* ch. 287.10(i), at 4737-4738).

wise have to violate Fourth Amendment rights before rejecting them as inadequate.²⁸ This is especially true in light of the majority's own confessed inability to explain why "immigration officers have not committed many Fourth Amendment transgressions * * *" (Pet. App. 28a). Although the majority opined that "[o]ne plausible explanation" (*ibid.*) for the paucity of such violations was the presumed applicability of the exclusionary rule to deportation proceedings prior to the BIA's decision in *Matter of Sandoval*, *supra*, the majority offered no explanation, plausible or otherwise, for the equally low incidence of Fourth Amendment transgressions in the post-*Sandoval* period (1979-present). This fact alone should have sufficed to demonstrate that the addition or elimination of the suppression sanction has little incremental impact on the officers' compliance with Fourth Amendment standards.

Moreover, the majority accepted the premise (Pet. App. 34a) that self-policing is the most effective deterrent—and therefore the preferred remedy—because it offers the most direct and immediate feedback to the offending officer. Having accepted that premise, the court should not then have "ignore[d] the possibility that a rigid application of an exclusionary rule * * * could have a serious deterrent impact on the formulation of additional standards to govern prosecutorial and police procedures." *United States v. Caceres*, 440 U.S. 741, 755-756 (1979) (footnote omitted). As the Court emphasized in *Caceres*, when "the Executive itself has provided for internal sanctions * * *, [t]o go beyond that, and require exclusion in every case, would take away from the Executive Department the primary responsibility for fashioning the appropriate remedy for the violation of its regulations"

²⁸ In fact, INS's disciplinary rules are not mere paper procedures. INS advises us that in the preceding four fiscal years, 20 officers have been suspended or terminated for misconduct affecting aliens. These infractions have come to light both by virtue of reports made by fellow officers and complaints filed by aliens.

(*id.* at 756). In other words, to require exclusion in every civil deportation proceeding in which a Fourth Amendment violation is shown would undermine what the majority concedes to be the most effective deterrent—self-policing. Given the complete lack of evidence to show that INS's internal disciplinary sanctions are not effective, there was no basis for the court's decision to undermine those internal sanctions by imposing an absolute exclusionary rule in civil deportation proceedings. At the very least, the existence of "commendable" internal sanctions counsels strongly against the creation of an additional "remedy," cf. *Bush v. Lucas*, No. 81-469 (June 13, 1983), in the absence of specific evidence of the ineffectiveness of the internal sanctions.

4. Declaratory or, if necessary, injunctive actions offer especially appropriate vehicles for correcting any institutional practices that might violate Fourth Amendment rights. Unlike the criminal field, in which there are hundreds or thousands of separate police forces, there is only one Immigration and Naturalization Service, and declaratory relief directed against the Service will, if necessary, be effective.

The majority rejected the utility of prospective injunctive relief on the theory that such relief "is generally available only after broad scale violations that result from official policy, and is rarely, if ever, effective to deter violations that result not from official policy but from an individual officer's overzealousness" (Pet. App. 34a). Assuming, arguendo, that the majority's premise is correct, it overlooks the fact that, for reasons of economy, INS does not generally waste scarce investigative resources by sending individual officers out in search of individual aliens. Rather, as explained in our brief in *INS v. Delgado*, *supra* (at 3-4 & n.3), factory surveys are the most effective means of detecting illegal aliens who have eluded the Border Patrol. During 1982, for example, factory surveys accounted for approximately 60% of all illegal aliens apprehended by INS in nonborder locations.

Thus, an injunctive action such as that brought by the *Delgado* respondents is clearly an effective means for determining the validity of an INS practice that affects large numbers of aliens. See also *Illinois Migrant Council v. Pilliod*, 540 F.2d 1062 (1976), modified on reh'g en banc, 548 F.2d 715 (7th Cir. 1977) (enjoining INS practice of questioning individuals simply on the basis of their Mexican ancestry or Spanish surnames).

If a recurring pattern of "overzealousness" by individual INS agents is ever demonstrated by actual cases, there will be time enough to devise an appropriate remedy. As we have shown, however, neither of the cases now before the Court involves any such problem. Thus, the court of appeals' out-of-hand rejection of injunctive and declaratory actions as effective deterrents was especially inappropriate here.

5. Finally, the majority erred in totally dismissing the utility of *Bivens* actions²⁹ as a deterrent tool. We do not disagree with the majority's observation (Pet. App. 33a) that those illegal aliens who have been deported are unlikely to bring many *Bivens* suits.³⁰ But the majority completely overlooked the fact that citizens or lawful aliens subjected to illegal searches or seizures can be expected to bring such actions,³¹ and the deterrence thereby

²⁹ *Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics*, 403 U.S. 388 (1971).

³⁰ It is worth noting, however, that *Bivens* suits have become yet another tool in illegal aliens' never-ending quest for delay. In *Ortega v. Rowe*, CA No. 5-81-198 (N.D. Tex. filed Dec. 9, 1981), three illegal aliens, representing a class of illegal aliens who might be arrested by the Border Patrol in Lubbock, have brought a *Bivens* suit claiming that they have been abused by Border Patrol agents and challenging the conditions of confinement at the jail where the named plaintiffs have been held. The district court granted the motion of the named plaintiffs for a stay of deportation so that they would not be separated from their attorneys during the pendency of their *Bivens* suit.

³¹ Several such actions are pending. See, e.g., *Cervantez v. Whitfill*, C.A. No. 2-79-206 (N.D. Tex. filed Dec. 12, 1979) (*Bivens* action

gained would naturally extend to the future benefit of all persons.

Moreover, the deterrence to be expected from *Bivens* actions does not logically depend on the number of such cases actually filed. Even if successful *Bivens* suits are relatively rare, the mere prospect of such suits being brought is a powerful disincentive to unlawful conduct. It defies common sense to suppose that fear of a suit against an immigration officer in his individual capacity, in which he is faced with the possibility of personal liability, has no influence on his conduct. As this Court has recognized, "there is the danger that fear of being sued will 'dampen the ardor of all but the most resolute, or the most irresponsible [public officials], in the unflinching discharge of their duties.'" *Harlow v. Fitzgerald*, 457 U.S. 800, 814 (1982) (brackets in original) (quoting *Gregoire v. Biddle*, 177 F.2d 579, 581 (2d Cir. 1949), cert. denied, 339 U.S. 949 (1950)).

The threat of *Bivens* actions can be expected to be a particularly effective deterrent for immigration officers. As we have noted, immigration officers arrest deportable aliens in such large numbers that their interest in any particular alien's deportation, and hence their incentive to engage in unlawful conduct, is extremely low. Under these circumstances, in which an immigration officer can make hundreds of arrests with very little effort, there is simply no reason for him to risk personal liability through overzealous conduct in any individual case. Thus, the *Bivens* deterrent is in fact substantial, and the court of appeals should not have rejected it.

6. In sum, the societal costs of extending the exclusionary rule to deportation proceedings are enormous and

by legal aliens and citizens alleging unlawful arrest and detention); *Ramirez v. Webb*, No. K-81-344-CA8 (W.D. Mich. filed Sept. 4, 1981) (*Bivens* action brought on behalf of Hispanic surnamed persons alleging unlawful detention and arrest).

Moreover, almost as a matter of definition, a majority of persons arrested without probable cause or detained without reasonable suspicion will not be illegal aliens. Consequently, illegal aliens constitute a minority of potential *Bivens* plaintiffs.

plainly outweigh any incremental increase in deterrence of illegal conduct by enforcement officials. This country is in an immigration crisis, with, as the court of appeals noted, between 3½ and 12 million illegal aliens already here and over 500,000 more entering every year (see Pet. App. 29a). The injection of complex constitutional questions into the immigration administrative hearing process, in which each immigration judge is currently making more than six adjudications per day (see pages 27-28 note 16, *supra*), could bring an already dangerously over-burdened system to a virtual halt. Extension of the exclusionary rule to civil deportation proceedings, the result of which could be to allow illegal aliens to perpetuate their presence in this country in violation of our immigration laws, thus seriously jeopardizes the Executive's ability to control illegal immigration. *Janis* makes clear that those who seek the extension of the exclusionary rule must demonstrate "sufficient justification for [that] drastic measure" (428 U.S. at 459). No such justification exists here.

CONCLUSION

The judgments of the court of appeals should be reversed.

Respectfully submitted.

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IMMIGRATION AND NATURALIZATION SERVICE,

Petitioner,

—v.—

ADAN LOPEZ-MENDOZA and ELIAS SANDOVAL-SANCHEZ,

Respondents.

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTION PRESENTED

Should application of the exclusionary rule in deportation proceedings be abandoned even though its deterrent effect is substantial, it has long been applied in this context without excessive social costs, and the government has not demonstrated that realistic or viable alternatives exist which would adequately safeguard against the wholesale violation of the Fourth Amendment rights of discrete racial and ethnic minorities?

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STATEMENT OF THE CASE

In separate deportation proceedings, Respondents Adan Lopez-Mendoza and Elias Sandoval-Sanchez sought unsuccessfully to suppress the use of evidence obtained by INS agents in violation of the Fourth Amendment.

1. INS arrested Respondent Elias Sandoval in 1976 during a raid at his workplace, a food processing plant, in Pasco, Washington. INS agents surrounded the plant to guard the exits on all four sides (JA 128). Investigator Bower, an INS law enforcement officer, and Officer Spence, a uniformed Border Patrol officer, entered the plant and stationed themselves at the entrance to the main work area during a change in shift. They checked the workers as one group filed past to leave work and another group filed past to enter the main work area (JA 133-34). Sandoval was in a line of workers entering the main work area

to commence work on the 3:00 p.m. shift (JA 148). He was dressed in his work uniform, which included a hard hat and face mask (JA 135-36,148; Pet. App. 106a). Sandoval testified that he did not realize that immigration officers were checking people entering the plant, but that he did see standing at the entrance a man in uniform who appeared to be a police officer (Pet. App. 106a-107a). As he was waiting to enter the main work area, an officer forcibly seized him by the back of the pants and the shoulder, took him out of line and locked him in the men's rest room of the plant (JA 147-48). After being held in the men's rest room for an unknown period of time, Sandoval was one of at least 37 people taken to the Pasco Police Department for further processing (JA 141).

At the deportation hearing, Officer Bower had no recollection of the initial

contact or detention of Sandoval (JA 135-38, 140).^{1/} Bower testified that his general practice was that if there were some kind of furtive conduct in line, such as avoiding eye contact, he would question the subject in

^{1/} In response to a question from Sandoval's counsel as to why Officer Bower believed he had probable cause to detain Sandoval, Office Bower testified:

A. We just initially detained because of the large number of people coming in and out of there. I initially detain them to question them further. Some people immediately said they had United States citizen wife, or maybe United States citizen children, and would fall within a category that they may have something going for them. Some were detained for more interrogation to figure out whether they would be taken, left at the plant, or whether they would be further processed in the processing facility, which happens to be the Pasco Police Department in that area.

Q. That is your complete rationale?

A. Yes.

Q. A large number of people, temporary detention, in order to investigate further at your convenience?

A. A lot of them were talked to further there, and ones that had wives, ones that had kids, ones that were single, determining which we handled in which manner, whether they should even be left there at the plant. For instance, I had one presented a document of some kind or another, wanted to talk to him more, at the time too busy talking to everybody else, he had to wait for further questioning. (JA 140).

English. His initial questioning consisted of queries such as "Good day outside?" "Hard work here?" "Do you make lots of money here?" (JA 134). For those who failed to respond or "had a dumb look on their face," Bower's practice was to ask in Spanish if the particular person had any papers or to question that person further or to detain him to question at a later time (Pet. App. 106a).^{2/}

At the Pasco Police Department, Sandoval was processed by Officer Bower who explained to Sandoval the I-274 (voluntary departure) form which contains an explanation of the right to a deportation hearing and a right to counsel. Sandoval's wife read the explanation

^{2/} It is unclear from the record whether any immigration officer said anything to Sandoval prior to his detention (JA 148). The record contains numerous omissions of Sandoval's testimony at JA 146-51. In addition, the record contains no evidence indicating that Sandoval was questioned while in the men's room or prior to his involuntary removal to the Pasco Police Department.

in Spanish to him, but he did not understand it, and did not know he had the right to remain silent (JA 146-47; Pet. App. 107a). Sandoval refused to sign the I-274 requesting voluntary departure^{3/} and asked for his counsel, Charles Barr (JA 143, 147). Officer Bower filled out an I-213, "Record of Deportable Alien," in which he indicated that Sandoval was born in Mexico and that he entered the U.S. without inspection (JA 162).

During the deportation hearing the government offered the I-213 to prove deportability (JA 125, 132). Sandoval's counsel moved to suppress the I-213 and to terminate the proceedings (Pet. App. 105a; JA 125, 151, 157). He argued that the evidence relied upon by the government should be

^{3/}At the police station, the group of 37 persons apprehended at the factory were first given the option of voluntary departure. The INS had a bus waiting to go to Mexico immediately. Out of the 37, a group of 13 immediately opted for voluntary departure, and they were processed first (JA 141).

suppressed because the warrantless arrest was unlawful and the I-213 was the "fruit of the poisonous tree." The immigration judge ruled that the arrest did not violate the Fourth Amendment: "The respondent could have at some time during the time in question reacted in a furtive manner in the presence of officials. This plus foreign appearance would . . . give rise to a suspicion of alienage . . . The respondent has failed to prove that this is not what took place in this case." (Pet. App. 107a-108a) (emphasis supplied). Based on the written record of Sandoval's admissions contained in the I-213, the immigration judge found him deportable, but granted him the privilege of voluntary departure.

On appeal, the Board of Immigration Appeals (BIA) held that Sandoval's statements were voluntary and found "no basis to conclude . . . that the circumstances of the

respondent's arrest affected the statements contained in the form I-213," citing its decision in Matter of Sandoval, 17 I.& N. Dec. 70 (BIA 1979), in which contrary to its prior longstanding practice, it held the Fourth Amendment exclusionary rule inapplicable in deportation proceedings (Pet. App. 112a).

2. Respondent Lopez was arrested by INS agents in August 1976 at his workplace, a wholesale transmission repair shop in San Mateo, California. Nearly a full month before the arrest, INS Agents Eddy and Elder had received an interoffice memorandum regarding a tip received by INS that seven named illegal aliens were working there (JA 16,104).^{4/} The day before the arrest, they drove past the shop, confirmed its location,

^{4/} The immigration judge made no factual findings pertinent to Lopez's suppression motion; we therefore rely here on relevant record testimony.

and telephoned the informant, a person previously unknown to them. Based solely on their telephone conversation, which yielded no additional details, they decided to visit the shop the next day for the purpose of interviewing the persons named by the informant (JA 16, 28-9, 40-1). At no time did the agents seek an arrest warrant for the named individuals or a search warrant to enter and search the private business premises. In fact, they had concluded that they did not have enough information to obtain either an arrest or search warrant (JA 28,32,47,53).

The two agents arrived at the shop at approximately 7:45 a.m. One agent approached the owner, Art Bradley, to request permission to conduct the interviews while the other stationed himself at the only door so that anyone inside would be prevented from leaving the premises. The owner refused permission

for interviews during working hours "without a court order" (JA 19). Because the agents "didn't feel like waiting four hours" by the door in order to apprehend anyone leaving before lunchtime (JA 53), they persisted in their demand for immediate interviews. As their persistence intensified, so did the owner's agitated refusal, until he eventually demanded that the city police be called (JA 72, 21-2).^{5/}

While agent Elder diverted the attention of the owner, agent Eddy advanced into the shop and approached Lopez. Under the government's view of the facts, the agent chose him for questioning solely because he was "relatively isolated" and therefore the

^{5/}Under Lopez's offer of proof, testimony would have been presented establishing that when Bradley, the owner, instructed one of his employees to call the San Mateo city police, agent Eddy said "No, don't call the police" to the employee, further exacerbating the uneasy sense of those in the shop that something illegal was occurring (JA 72-3).

owner could not interfere with the interview (JA 23).^{6/} The agent maintained that nothing in Lopez's appearance, behavior, or speech had aroused his suspicion. Furthermore, according to the agent, Lopez's name was not on the list provided by the informant. In response to the agent's questioning, Lopez gave his name and indicated that he was from Mexico with no close family ties in the United States (JA 20-21). The agent placed him under arrest.^{7/} Both agents then engaged in an

^{6/} Respondent Lopez was prepared to establish at his deportation hearing, through owner Bradley's testimony, that the agents had Lopez's name before going to the transmission shop, that the agents did not show Bradley the list of names provided by the informant but instead specifically asked for Adan Lopez-Mendoza by name, and that agent Eddy approached Respondent for questioning because of the name "Adan" sewn on his work shirt. If the agents had Lopez's name before going to the transmission shop, there is no justification for their failure to obtain an arrest warrant. The statutory authority for INS agents to make arrests, 8 U.S.C. §1357(a)(2), presupposes that warrants must be obtained absent exigent circumstances.

^{7/} The agent also questioned another worker, Nelson

argument with Bradley, which at this point bordered on a physical confrontation (JA 38). Bradley placed himself between the agents and Lopez and indicated that they had no right to remove him without a court order. Agent Eddy emphatically poked Bradley on the chest with his finger and said that if he continued to interfere, they would arrest him (JA 38). They then departed with Lopez in custody.

Lopez underwent further interrogation at INS offices where, without advice of counsel, he allegedly admitted he was born in Mexico, was still a citizen of Mexico, and that he entered without inspection (JA 82-3). Based on his answers, the agents prepared the I-213 and an accompanying affidavit (JA 98-9).

The only evidence introduced by the INS

Melendez, a permanent resident, who was asked for his name and whether he was a citizen or resident of the United States (JA 72).

against Lopez at his deportation hearing was this Form I-213, and the accompanying affidavit. Prior to the proceeding on the merits, Lopez, through counsel, sought a hearing on the legality of the arrest (JA 14). The immigration judge determined prior to the completion of the hearing that an illegal arrest did not affect "the propriety" of the proceeding. He therefore declined to make findings of fact regarding the legality of the arrest (JA 79), although he did allow counsel for Lopez to make an offer of proof (JA 69-74). The immigration judge found Lopez deportable, and granted him the privilege of voluntary departure (Pet. App. 97a-99a). The BIA dismissed his appeal, relying upon its decision in Matter of Sandoval, supra (JA 163).

3. On petitions for review of their deportation orders, the Ninth Circuit consolidated the cases for argument en banc,

and held in a seven to four decision 1) that Sandoval's detention at the police station constituted an arrest not based upon probable cause, and was therefore unlawful under the Fourth Amendment; 2) that Sandoval's admission of illegal alienage was a product of the unlawful arrest within the meaning of Brown v. Illinois, 422 U.S. 590 (1975); and 3) that "the exclusionary rule bars the INS from using, in deportation proceedings, evidence of statements it obtains illegally." (Pet. App. 3a). The court reversed Sandoval's order of deportation. Finding the record insufficient to determine whether the Fourth Amendment had been violated in Lopez's case, the court of appeals vacated and remanded Lopez's order of deportation for further proceedings in light of its opinion.^{8/}

^{8/} The question of whether Lopez's detention violated the Fourth Amendment was not adjudicated in his deportation hearing.

In reaching its decision, the court of appeals applied the analysis set forth in United States v. Janis, 428 U.S. 433

(1976). The court first examined the strength of the connection between those who illegally obtained the evidence, and those who sought to use it in a subsequent proceeding. The court observed that the officers and prosecutors not only are members of the same government agency, the INS, but also share a common goal and purpose. The INS agents who interrogated Sandoval after arresting him "did so exclusively to aid in filling out INS Form I-213, the form used by INS attorneys at Sandoval's deportation hearing to prove deportability." (Pet. App. 23a).

The court next considered the extent to which the persons whose "conduct is to be controlled" are otherwise subject to the deterrent effects of the rule. Because

deportation of illegal aliens is the prime concern of immigration officers, rather than criminal prosecutions, the court concluded that deportation is within the agent's "zone of primary interest." (Pet. App. 24a). The court concluded that the deterrent value of exclusion in deportation proceedings is direct, substantial, and efficient.

The court observed that the sanction is "routinely" applied in "core" cases like the present one where the deterrent value is strong, without further balancing the value of enforcing the Fourth Amendment against various non-constitutional social costs. Nevertheless, the court proceeded under Janis to assess the "social cost of applying the exclusionary rule in deportation proceedings and to balance that cost against the substantial deterrent impact of the sanction on INS misconduct" (Pet. App. 27a), and concluded that the deterrent benefit "far

outweighs" the social cost of "barring the INS from using in deportation proceedings evidence which its officers seize in violation of the Fourth Amendment." (Pet. App. 32a). The court also examined and rejected as "unrealistic and unacceptable" each of the alternatives to the exclusionary rule suggested by INS (Pet. App. 33a-35a). In sum, the court concluded, based in part on past INS experience with the rule, that the "only realistic way" to ensure that INS agents respect the Fourth Amendment is to apply the exclusionary rule in deportation proceedings (Pet. App. 37a).

INTRODUCTION AND SUMMARY OF ARGUMENT

This case represents the first judicial re-examination of the application of the exclusionary rule in deportation proceedings since the BIA in 1979, in the words of the court below, "cut against the grain of its own historic practice and the views of every

court and commentator to have considered the issue," (Pet. App. 13a), and held, in a case unrelated to this one, that the exclusionary rule does not bar the INS from using evidence obtained in violation of the Fourth Amendment. Matter of Sandoval, 17 I. & N. Dec. 70 (BIA 1979) (sanctioning use of evidence seized by INS agents during illegal search of alien's home). In holding that the rule does apply, the court of appeals followed a long and consistent history of the rule's application in deportation proceedings by the federal courts, and until recently, by the BIA. Contrary to the government's characterization of the decision below as "extending" the exclusionary rule "to an entirely new category of cases" and creating a "new barrier" to enforcement of immigration laws (Pet. Br. 10-11), it merely marks a return to longstanding former practice. Until 1979, the INS "performed its

investigative and prosecutorial functions in a legal regime in which the exclusionary rule was thought to apply." (Pet. App. 14a).

Abandonment of the exclusionary rule in deportation proceedings, after over sixty years of applicability, poses palpable dangers to the Fourth Amendment rights of discrete racial and ethnic minorities, particularly those of Hispanic Americans. The Fourth Amendment, which, as the government concedes, applies to documented and undocumented aliens found in this country, as well as to citizens, safeguards against undue interference with the privacy and security of law-abiding persons, and protects against frightening or unsettling shows of arbitrary authority by government officials. E.g., Almeida-Sanchez v. United States, 413 U.S. 266 (1973). Without the exclusionary rule -- the only effective device for enforcing the Fourth Amendment in

the immigration context -- the Fourth Amendment rights of those citizens who share racial, ethnic, and linguistic characteristics with the targets of immigration searches will inevitably suffer a crippling blow. Such citizens are already, at a minimum, subjected to a heightened degree of suspicion and scrutiny by INS officers, solely because of their race. Freed from the deterrent constraints of the exclusionary rule, and subject to the predictable pressures of enforcing immigration laws, immigration officials would inevitably ignore the careful balancing of Fourth Amendment protections and law enforcement needs which this Court has structured. Most Americans, on the other hand, who are insulated against suspicion of being undocumented aliens by accidents of color and language, would continue to enjoy full Fourth Amendment protection.

Although the government maintains that the court of appeals correctly applied the cost-benefit analysis outlined in United States v. Janis, 428 U.S. 433 (1976), it argues that the court erred in the "values it brought to its analysis" (Pet. Br. 23, emphasis added), and additionally urges that the weighing of costs and benefits should not be "performed on scales that are evenly balanced" (Pet. Br. 20). In effect, the government asks Hispanic Americans to surrender the enjoyment of their Fourth Amendment rights to permit more efficient enforcement of the immigration laws. Although the court below recognized and appreciated the "enormity of the enforcement task that Congress has assigned INS" (Pet. App. 32a), it properly rejected such an unjust result. Where the government has left out of the balance the burden which would be imposed on Hispanic Americans if the rule

were abandoned, it is particularly inappropriate to insist that Respondents bear the burden of empirically proving the rule's past effectiveness, especially in light of the Court's acknowledgement in Janis of the virtual impossibility of doing so. Moreover, based on past experience of applying the rule in deportation proceedings, as well as the BIA's post-Matter of Sandoval practice of reaching Fifth Amendment issues, including under this rubric particularly flagrant Fourth Amendment violations, the court below was fully justified in concluding that its decision would not unduly burden the INS enforcement system. Whatever the solution to the intractable problem of illegal immigration, it does not lie in judicial abandonment of Fourth Amendment values.

I. A. Excluding evidence obtained in violation of the Fourth Amendment exerts a necessary and substantial deterrent effect on

unconstitutional INS conduct. Deportation of illegal aliens, not criminal prosecution, constitutes the primary concern of INS officers. In addition, the offending officer and the agency which uses the evidence share a common law enforcement goal and purpose. Thus, unlike Janis, where exclusion would exert, at most, only a marginally increased deterrent effect on inter-sovereign unconstitutional behavior, the continued applicability of the exclusionary rule in deportation proceedings would exert a direct and substantial deterrent effect on intra-agency unconstitutional conduct.

The alternatives to the exclusionary rule proposed by INS do not provide equally effective protection of Fourth Amendment rights. These alternatives have been used in the past to supplement the application of the exclusionary rule, but are wholly ineffective in adequately deterring Fourth Amendment

violations. Nearly insurmountable standing and equitable prerequisites render injunctive relief extremely difficult to obtain. City of Los Angeles v. Lyons, --- U.S. ---, 75 L.Ed. 2d 675, 103 S.Ct. 1660 (1983); Rizzo v. Goode, 423 U.S. 362 (1976); O'Shea v. Littleton, 414 U.S. 488 (1974), and it is in any event unavailable until after the deterrence mechanism has failed. Civil damage actions are expensive to bring, time consuming, not readily available, and, because of the availability of immunity, provide no disincentive for close cases and no incentive for adoption of system-wide procedures to ensure constitutional behavior. Reliance on internal rules, training and discipline has never been effective in deterring Fourth Amendment violations, and in the case of INS has utterly failed to stop even the most flagrant and appalling misconduct. Finally, a Fifth

Amendment due process exclusionary rule for "egregious" violations of Fourth Amendment rights deters only egregiously severe searches and seizures, and permits unreasonable, but less severe, violations. In effect, it rewrites the Fourth Amendment itself in the immigration context. Only the exclusionary rule provides a remedy adequate to safeguard these important values.

B. In assessing the societal costs of suppression, the government less than candidly ignores past and present BIA practice of suppressing evidence obtained in violation of Fifth and Fourth Amendment rights. The government's speculative discussion of the practical effects of the rule ignores the system's actual acceptance of and demonstrated ability to cope with suppression rulings in deportation proceedings. As illustrated by past administrative and judicial history, applying

the exclusionary rule in deportation proceedings will not unduly impede INS enforcement of immigration laws, and will not result in a granting of immunity from deportation. The government's attempts to rely on non-record "facts," which are patently untrustworthy and inaccurate, cannot provide the missing factual underpinnings for its arguments.

C. Given the long history of applying a rule of exclusion in deportation proceedings, and the pressures for enhanced enforcement now faced by INS, abandonment of the rule at this time without the existence of equally effective alternatives will inevitably lead to an "open season" on Hispanic Americans, resulting in the wholesale violation of Fourth Amendment rights based on racial or ethnic appearance. Balancing the societal costs of exclusion against the harm to the rights of Hispanic Americans which would flow

from the loss of the rule's substantial deterrent impact on INS misconduct, the rule must be applied in deportation proceedings.

II. To the extent that the government argues that application of the exclusionary rule is unworkable in the immigration context, its real quarrel is with the Fourth Amendment itself. It is the Fourth Amendment that puts restrictions on INS officers, not the exclusionary rule. The Fourth Amendment requires that searches and seizures be based on specific objective facts indicating that society's legitimate interest requires such action, or that the seizure be carried out pursuant to a plan embodying explicit, neutral limitations on the conduct of individual officers. Brown v. Texas, 443 U.S. 47 (1979); Delaware v. Prouse, 440 U.S. 648 (1979).

The substantial underlying Fourth Amendment violations in this case involve at

worst a flagrant disregard of probable cause requirements, Dunaway v. New York, 442 U.S. 200 (1979), and at best a reckless failure by INS to avoid the danger of arbitrariness by instituting and following a plan embodying neutral limitations on the unbridled discretion of its officers. Cf. Delaware v. Prouse, supra. By failing to seek review of the Fourth Amendment ruling in this case, the government forfeited its right to challenge the underlying Fourth Amendment holding. In any event, the court below properly concluded that the INS violated Respondent Sandoval's Fourth Amendment rights by arresting him without probable cause, and correctly remanded Respondent Lopez's case for further factual findings.

ARGUMENT

I. THE COURT BELOW CORRECTLY APPLIED THE EXCLUSIONARY RULE IN DEPORTATION PROCEEDINGS

Unless the exclusionary rule is applied in deportation proceedings to enforce the Fourth Amendment against immigration officials, millions of law-abiding Hispanic Americans who share racial, ethnic and linguistic characteristics with the targets of immigration searches will inescapably be exposed to wide-ranging intrusions into their personal and professional lives at the hands of officials who confuse ethnicity with probable cause. If the exclusionary rule -- the only effective device for enforcing the Fourth Amendment in an immigration context -- is abandoned after over 60 years of applicability, two tiers of Fourth Amendment protection will exist in the United States. Most Americans, insulated against suspicion

of being undocumented aliens by accidents of color and language, will continue to enjoy full Fourth Amendment protection. Hispanic Americans, on the other hand, will be subject to a wholly different regime under which immigration officials, alerted by racial or ethnic characteristics, will be free to carry out unlawful intrusions without the deterrent constraints of the exclusionary rule.

This Court has long recognized the obvious danger of permitting racial or ethnic characteristics to play a substantial role in determining the reasonableness of an investigatory intrusion. E.g., Davis v. Mississippi, 394 U.S. 721 (1969); United States v. Brignoni-Ponce, 422 U.S. 873 (1975). Despite these misgivings, however, the Court, concerned with the difficulty of enforcing the immigration laws, has suggested that ethnic characteristics may be relevant in determining whether sufficient grounds

exist for an investigative stop of a putative undocumented alien. United States v. Brignoni-Ponce, supra at 886-887; United States v. Martinez-Fuerte, 428 U.S. 543, 563 (1976). At a minimum, therefore, Hispanic Americans who share the physical characteristics of undocumented aliens are already subject to a heightened degree of suspicion and scrutiny by immigration officials solely because of their race. Because they live and work alongside the aliens INS seeks to apprehend, these Americans have frequently found themselves swept into intrusive and arbitrary INS workplace raids and neighborhood dragnets.^{9/} If, in addition to the

^{9/} Patterns of INS conduct described in reported cases evidence widespread Fourth Amendment violations by immigration officers in such operations. E.g., INS v. Delgado, No. 82-1271 (argued on January 11, 1984); Illinois Migrant Council v. Pilliod, 540 F.2d 1062 (7th Cir. 1976), modified on rehearing en banc, 548 F.2d 715 (7th Cir. 1977); LaDuke v. Nelson, 560 F. Supp. 158 (E.D. Wash. 1982); Mendoza v. INS, 559 F. Supp. 842 (W.D. Tex. 1982); Marquez v. Kiley, 436 F.

inevitable burden created by the existence of shared racial characteristics, this Court were to remove the deterrent effect of the exclusionary rule, the Fourth Amendment rights of Hispanic Americans would suffer a crippling blow. Freed from the deterrent constraints of the exclusionary rule and subjected to the nearly overwhelming pressures of enforcing immigration laws, immigration officials would inevitably intensify dragnet techniques and would inevitably ignore the careful balance struck by Almeida-Sanchez v. United States, 413 U.S. 266 (1973); United States v. Ortiz, 422 U.S. 891 (1975); United States v. Brignoni-Ponce, 422 U.S. 873 (1975); United States v. Martinez-Fuerte, 428 U.S. 543 (1976); and United States v. Cortez, 449 U.S. 411 (1981). Law abiding Hispanic Americans would

Supp. 100 (S.D.N.Y. 1977). See also note 84, infra.

inexorably be swept into a net of suspicion, humiliation and fear. In effect, in this case, the government asks Hispanic Americans to surrender the enjoyment of their Fourth Amendment rights to permit more efficient enforcement of the immigration laws. That is a price no American may be asked to pay.

A. Application of the Exclusionary Rule in Deportation Proceedings Provides Substantial, Efficient, and Necessary Deterrence of Unconstitutional INS Conduct

This Court has utilized two common sense criteria in determining whether to exclude evidence gathered in violation of constitutional norms: First, it has inquired whether excluding the evidence would exert a substantial deterrent effect on unconstitutional conduct;^{10/} second, it has

^{10/} E.g., United States v. Janis, 428 U.S. 433 (1976); Stone v. Powell, 428 U.S. 465 (1976); United States v. Calandra, 414 U.S. 338, 348 (1974). The "imperative

considered whether the consequences of the proceeding are sufficiently serious to warrant the rule's protection.^{11/} Applying the Court's analysis, the deportation

of judicial integrity" has also played a role in this Court's rulings. See, e.g., Elkins v. United States, 364 U.S. 206, 222-223 (1960); Weeks v. United States, 232 U.S. 383, 392-394 (1914). In recent cases, concern regarding "judicial integrity" has focused on the question "whether the admission of the evidence encourages violations of Fourth Amendment rights," United States v. Janis, 428 U.S. at 458 n.35, and has been viewed as essentially merged with the question of whether exclusion would serve a deterrent purpose. See United States v. Peltier, 422 U.S. 531, 538 (1975); Michigan v. Tucker, 417 U.S. 433, 450 n.25 (1974). Although we submit that judicial integrity underlies the rule quite apart from deterrent concerns, for the purposes of this brief, we concentrate on the rule's deterrent purpose.

^{11/} See One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965); Boyd v. United States, 116 U.S. 616 (1886). As explained in 1 W. LaFare, Search and Seizure §1.5 at 98 (discussing the application of the exclusionary rule to administrative hearings), the Plymouth Sedan case "strongly suggests that a highly relevant (but not necessarily controlling) factor is the magnitude of the consequences for the individual involved." Exclusion would be "most compelling when the administrative agency has an investigative function and investigative personnel of that agency participated in the illegal activity for the purpose of providing information to support administrative proceedings against the suspect." Id. at 99.

proceedings here fall at the very core of the Court's concerns.

Unlike grand jury,^{12/} federal habeas corpus,^{13/} or inter-sovereign civil tax proceedings,^{14/} where this Court held that exclusion would effect, at most, a marginally increased deterrent effect on unconstitutional behavior, the continued applicability of the exclusionary rule in deportation proceedings would exert a direct and palpable - indeed the only direct and palpable - deterrent effect on the use of unconstitutional investigatory methods by immigration officials. Where, as in Calandra, Stone v. Powell and Janis, the principal purpose of an investigation is to gather evidence for a criminal proceeding,

^{12/} United States v. Calandra, 414 U.S. 338 (1974).

^{13/} Stone v. Powell, 428 U.S. 465 (1976).

^{14/} United States v. Janis, 428 U.S. 433 (1976).

the presence of an exclusionary rule in the criminal proceeding already exerts a deterrent effect on the average investigation which can only be marginally enhanced by imposing an exclusionary rule on the grand jury process, by providing collateral habeas corpus review of the legality of a state investigation, or by imposing an exclusionary rule in an inter-sovereign civil tax proceeding.^{15/} Where, however, as here, the principal purpose of an investigation is to gather evidence for deportation, the applicability of an exclusionary rule to

^{15/} The focus on deterrence rather than on punishment or compensation of particular individuals derives from the rule's role as a "judicially created remedy designed to safeguard Fourth Amendment rights generally through its deterrent effect, rather than a personal constitutional right of the party aggrieved." United States v. Calandra, 414 U.S. 338, 348 (1974). Thus, the rule is designed to "prevent, not to repair," to "compel respect for the constitutional guaranty in the only effectively available way - by removing the incentive to disregard it." Elkins v. United States, 364 U.S. 206, 217 (1960).

civil deportation proceedings is the only effective way to deter Fourth Amendment violations by immigration investigators.^{16/} The possible application of the exclusionary rule to a rare or a non-existent criminal proceeding can exert virtually no deterrent effect. Moreover, unlike a civil tax

^{16/} Contrary to the government's assertion, the fact that the primary enforcement efforts of INS agents are directed toward deportation, which has long been classified as a civil rather than criminal sanction, does not diminish the need for Fourth Amendment protections. Where the government intrudes, "the privacy interest suffers whether the government's motivation is to investigate violations of criminal laws or breaches of other statutory or regulatory standards." Delaware v. Prouse, 440 U.S. 648, 662 (1979), quoting Marshall v. Barlow's, Inc., 436 U.S. at 307, 312-313 (1978).

The relationship between the seizure of the evidence and its use is the relevant criterion, not the nature of the sanction applied in the proceedings. This Court's decision in United States v. Calandra, supra, quoted out of context by the government, is not to the contrary (Pet. Br. 22). In discussing the exclusionary rule, the Court in Calandra noted that the need for deterrence and the rationale for excluding evidence are strongest where the government seeks to use such evidence to "incriminate the victim of the unlawful search." 414 U.S. at 348. Precisely the same considerations apply here, where the government seeks to deport the victim of the unlawful search or seizure.

proceeding, where the stakes are primarily economic, this Court has long recognized both the public interest in enforcement of immigration laws and the fact that deportation proceedings may result in the loss "of all that makes life worth living." Ng Fung Ho v. White, 259 U.S. 276, 284 (1922). See also Bridges v. Wixon, 326 U.S. 135, 154 (1945); Wong Yang Sung v. McGrath, 339 U.S. 33, 50 (1950).

Thus, whether one views the issue in terms of the deterrent effect of the exclusionary rule or the potential consequences of the proceeding, the prior decisions of the Court compel the conclusion that the exclusionary rule is fully applicable to a deportation hearing. Moreover, when one balances the societal costs of exclusion against the harm to the rights of Hispanic Americans which would inevitably flow from abandonment of the

rule's substantial deterrent impact on INS misconduct, the balance clearly falls in favor of applying the exclusionary rule in deportation proceedings.^{17/}

1. Deportation Falls Within the Offending INS Officers' "Zone of Primary Interest"

Obtaining evidence of deportability is in the offending agent's "zone of primary interest." See United States v. Janis, 428 U.S. at 458. Deportation of illegal aliens, not criminal prosecution, is the primary concern of immigration officers, as the government concedes (Pet. Br. 37). Fewer than 2% of deportable aliens are ever convicted of criminal violations of immigration laws (Pet. App. 24a). It is therefore highly unlikely that INS officers

^{17/} Given the strong deterrent effect of applying the rule in this context, the government appropriately bears the burden of demonstrating that abolishment of the rule will not lead to widespread arbitrary intrusions in Hispanic American communities.

will be adequately deterred from violating the Fourth Amendment solely by the prospect of unsuccessful criminal prosecutions.^{18/}

The government argues that any deterrent effect of applying the rule is minimal because the comparatively high number of arrests made by each officer and the large percentage of aliens who opt for voluntary departure (rather than requesting a hearing) mean that "less is at stake" in each case, and, thus, that there is less incentive to engage in unlawful searches and seizures (Pet. Br. 37-9). But INS success is measured by the number of illegal aliens deported by the agency as a whole. Strong systemic

^{18/} As set forth in Tirado v. Commissioner of Internal Revenue, 689 F.2d 307,311 (2d Cir. 1982), cert. denied, --- U.S. --, 75 L.Ed. 2d 484 (1983), the "key question is whether the particular challenged use of the evidence is one that the seizing officials were likely to have had an interest in at the time - whether it was within their predictable contemplation and if so, whether it was likely to have motivated them."

incentives presently encourage INS agents to focus on the quantity of apprehensions rather than their quality under constitutional standards; only the "strong medicine" of the exclusionary rule would force INS officers and their supervisors to conform to the constitutional limits of their authority in their investigations.^{19/} Because each individual officer cannot know in advance which aliens will opt for a hearing,^{20/} the

^{19/} The exclusionary rule acts as a powerful incentive to adoption of law enforcement procedures designed to comply with Fourth Amendment guidelines. See, e.g., Stewart, The Road to Mapp v. Ohio and Beyond: The Origins, Development and Future of the Exclusionary Rule in Search-and-Seizure Cases, 83 Col.L.Rev. 1365, 1400 (1983); Mertens and Wasserstrom, The Good Faith Exception to the Exclusionary Rule: Deregulating the Police and Derailing the Law, 70 Geo. L.J. 365, 399-401 (1981); Amsterdam, Perspectives on the Fourth Amendment, 58 Minn. L. Rev. 349,429 (1974); see also Stone v. Powell, 428 U.S. at 492 (over the long term, the exclusionary rule "encourage[s] those who formulate law enforcement policies and the officers who implement them to incorporate Fourth Amendment ideals into their value system").

^{20/} In Respondent Sandoval's case, only about one-third of those transported to the police station opted for immediate voluntary departure. See note 3, supra. Although built-in incentives encourage aliens

rule would force the agency to ensure that its investigative officers generally conform to the Fourth Amendment.

Moreover, the connection between those who illegally obtained the evidence and those who seek to use it in a subsequent proceeding could not be more direct. The INS not only apprehends deportable aliens and initiates proceedings against them, but also adjudicates their entitlement to remain in the country.^{21/} The offending officer and

to waive a deportation hearing, especially if they wish to avoid lengthy detention or wish to reenter the country, see 8 U.S.C. §1326, it would of course be unlawful for INS agents to coerce involuntary waivers of hearings. See Perez-Funez v. District Director, INS, No. CV 81-1457-ER, No. CV-81-1932-CBM (C.D. Cal. January 24, 1984) (INS voluntary departure procedures for unaccompanied minors violate due process).

^{21/} Deportation hearings are conducted by immigration law judges. 8 U.S.C. §1252(b). The Board of Immigration Appeals (BIA) hears appeals from decisions of the immigration law judges, 8 C.F.R. §3.1(b), and its decisions are subject to review by the Attorney General. 8 C.F.R. §3.1(h).

Until recently, immigration judges were subject to the budgeting control of INS District Directors, who also have major law enforcement responsibilities. Conflicting priorities and the lack

the agency which uses the evidence share a common goal and purpose. In contrast to Janis where the Court declined to apply the exclusionary rule in a federal civil tax proceeding involving violation of the Fourth Amendment by state criminal law enforcement officials,^{22/} this case involves not only an

of sufficient administrative support led to backlogs in deportation cases ranging from 3 months to 2 years. See U.S. Commission on Civil Rights, The Tarnished Golden Door: Civil Rights Issues in Immigration (1980) at 110-111 (citing testimony of former Chief Immigration Judge Herman Bookford); see also Marcello v. Bonds, 349 U.S. 302, 305-310 (1955). Last year, INS adjudicative functions were organized under a newly created office, the Executive Office for Immigration Review, under the Associate Attorney General's supervision. See 8 C.F.R. §§1.1(n); 3.0-.1; 3.9; 100.2(a); 48 Fed. Reg. 8038-39 (Feb. 25, 1983); 28 C.F.R. §§0.105(a); 0.109; 0.115-0.117; 48 Fed. Reg. 8056-57 (Feb. 25, 1983).

^{22/} In addition, deportation proceedings are more quasi-criminal than civil in nature. Deportation, a severe sanction in itself, is imposed for violation of the same immigration laws on which criminal prosecutions are based, 8 U.S.C. §§1325, 1326, and thus closely resemble civil forfeiture proceedings. Application of the exclusionary rule may therefore be alternatively justified under the rationale of One 1958 Plymouth Sedan v. Pennsylvania, 380 U.S. 693 (1965) (forfeiture of article used in violation of criminal law). See also Jordan v. DeGeorge, 341 U.S. 223, 231 (1951); Fong Haw Tan v. Phelan, 333 U.S. 6, 10

intra-sovereign violation, but also an intra-agency violation.^{23/} The deterrent impact of

(1948). As noted by dissenting Board Member Applemen in Matter of Sandoval, 17 I. & N. Dec. at 95-96, "[i]n essence, civil and criminal [immigration] proceedings walk hand in hand in intrasovereign wedlock."

^{23/} As noted in Janis, 428 U.S. at 456, the seminal cases that apply the exclusionary rule to civil proceedings involve intrasovereign violations, where the proceedings are closely related to the goals of the investigation that occasioned the unlawful conduct. E.g., Donovan v. Sarasota Concrete Company, 693 F.2d 1061 (11th Cir. 1982) (affirming Occupational Safety and Health Review Commission's use of exclusionary rule to suppress evidence obtained in unreasonable administrative inspection); Weyerhaeuser Co. v. Marshall, 452 F. Supp. 1375 (E.D. Wis. 1978), aff'd, 592 F.2d 373 (7th Cir. 1979) (ordered suppression of evidence in OSHA proceeding obtained through inspection made pursuant to warrant issued without probable cause); Pizzarello v. United States, 408 F.2d 579 (2d Cir.), cert. denied, 396 U.S. 986 (1969) (evidence unlawfully seized by IRS agents for use in criminal tax proceeding was barred from use in IRS civil tax proceeding); Iowa v. Union Asphalt & Roadoils, Inc., 281 F. Supp. 391, 406-409 (S.D. Iowa 1968), aff'd sub nom., Standard Oil Co. v. Iowa, 408 F.2d 1171 (8th Cir. 1969) (business records seized by state attorney general excluded from resulting civil antitrust proceeding); Knoll Associates, Inc. v. FTC, 397 F.2d 530 (7th Cir. 1968) (documents seized for purposes of FTC investigation excluded from resulting hearing); see also United States v. Blank, 261 F. Supp. 180 (N.D. Ohio 1966) (exclusionary rule in federal civil tax assessment proceeding bars admission of evidence obtained in unlawful IRS search).

invoking the rule in deportation proceedings is therefore substantial and efficient.

Apparently sensing that Janis does not easily support its case, the government now suggests that the factors outlined in Janis do not in themselves establish the need for a deterrent sanction, and urges this Court to adopt a new approach, placing on Respondents the burden of empirically proving the beneficial effects of applying the sanction in deportation proceedings. That approach should be rejected in this case for the same reason the Court has rejected similar suggestions in the past. No effective quantitative measure of the rule's deterrent efficacy has been devised or applied. As this Court emphasized in Janis, 428 U.S. at 451-452, no available studies provided reliable conclusions.^{24/}

^{24/} Post-Janis studies also fail to provide adequate empirical data on the efficacy of the exclusionary rule. See, e.g., Davies, What We Know (and Still Need

The number of variables is substantial, and many cannot be measured or subjected to effective controls. Recordkeeping before Mapp was spotty at best, and thus severely hampers before-and-after studies. Since Mapp, of course, all possibility of broad-scale controlled or even semi-controlled comparison studies has been eliminated.

The same obstacles prevent any such study of the deterrent effect of applying the rule in deportation proceedings. As the Solicitor General well knows, INS recordkeeping does not afford a reliable basis for statistical analysis.^{25/} Even if adequate records existed, the long history of applying the rule to deportation proceedings would make any before-and-after comparison impossible or so restricted in time that it would invalidate any conclusions drawn from such a comparison.

to Learn) About the "Costs" of the Exclusionary Rule: A Hard Look at the NIJ Study and Other Studies of "Lost" Arrests, American Bar Foundation Research Journal, No.3, 611,629 (1983).

^{25/} See discussion at 58,45,88-90, infra.

2. The Alternatives to the Exclusionary Rule Proposed By INS Are Neither Realistic Nor Viable Substitutes, and Would Not Provide Protection of Fourth Amendment Rights

The court below properly rejected as both unrealistic and unacceptable the alternatives to the exclusionary rule proposed by INS. After considering the inherent limitations of each of the alternatives urged by INS, the court of appeals correctly placed the burden on INS to demonstrate that its proposed alternatives, either singly or taken together, constituted a viable substitute for the rule. INS insists that the court's approach was "backward," and that the court erred in requiring INS to demonstrate the actual effectiveness and workability of its alternatives (particularly its disciplinary procedures) before accepting them as adequate safeguards against the overzealous conduct of

INS officers (Pet. Br. 44). Given the direct and substantial deterrent effect of the rule in this context, and the long history of applying the suppression sanction in deportation proceedings (see infra pp. 65-79), however, the court below properly declined to abandon the rule in the absence of such a showing by INS.^{26/} We urge the Court to exercise similar caution, particularly in light of INS failure to demonstrate any actual internal effort to monitor Fourth Amendment violations, or to discipline officers for such unlawful

^{26/} As Justice Stewart has recently observed in The Road to Mapp v. Ohio and Beyond, supra, 83 Col. L. Rev. at 1386,

"[W]hen the effectiveness of alternative remedies is considered, we must bear in mind that the exclusionary rule is now part of our legal culture. Realistic appraisals of the effectiveness of the rule must, therefore, take into account the inevitable misperceptions that will arise in the minds of many that 'repealing the rule' would signal a weakening of our resolves to enforce the dictates of the fourth amendment."

conduct. The alternative remedies urged by the INS have been used in the past to supplement the application of the exclusionary rule, but for the reasons set forth below, are wholly ineffective in adequately deterring Fourth Amendment violations. Without efficacious sanctions, the Fourth Amendment would remain a mere "form of words" for those most in need of protection.^{27/}

a. Although the government argues that declaratory or injunctive actions offer "appropriate vehicles for correcting any institutional practices that might violate Fourth Amendment rights" (Pet. Br. 46), there are nearly insurmountable standing and equitable prerequisites which render injunctive relief extremely difficult to

^{27/} See Mapp v. Ohio, 367 U.S. 643, 648 (1961), quoting Silverthorne Lumber Co. v. United States, 251 U.S. 385, 392 (1920).

obtain even when violations may be flagrant or widespread. Under City of Los Angeles v. Lyons, -- U.S. --, 75 L.Ed.2d 675 (1983), a victim of an illegal INS search or seizure would be required to make a "showing of a real and immediate threat of future harm." Since "past exposure to illegal conduct does not in itself show a present case or controversy regarding injunctive relief . . . if unaccompanied by any continuing, present adverse effects," O'Shea v. Littleton, 414 U.S. 488, 496 (1974), injunctive relief is obtainable only in the few cases where the victims of the search could establish that INS officers would subject them to another unlawful search and seizure. Respondents here and their co-employees, for example, almost certainly could not even now obtain injunctive relief. Moreover, those seeking to enjoin Fourth Amendment violations by INS officers also bear a heavy burden of showing

that widespread violations result from an official INS policy, rather than from a series of unrelated instances. Rizzo v. Goode, 423 U.S. 362 (1976). Finally, even if such hurdles could be overcome, an injunction cannot be obtained without proof that broad scale violations of rights have already occurred.^{28/} Accordingly, an injunction can be obtained only after the deterrence mechanism has failed. Even when all the above prerequisites to maintaining such an action are met, injunctive actions provide a useful supplement to, but not a substitute for the application of the exclusionary rule.^{29/}

^{28/} See, e.g., International Ladies Garment Workers Union v. Sureck, 681 F.2d 624 (9th Cir. 1982), cert. granted sub nom. INS v. Delgado, -- U.S. --, 76 L.Ed. 2d 805, 103 S.Ct.1872 (1983); Illinois Migrant Council v. Pillod, 540 F.2d 1062 (7th Cir. 1976), modified on rehearing en banc, 548 F.2d 715 (1977); LaDuke v. Nelson, 560 F. Supp. 158 (E.D. Wash. 1982); Mendoza v. INS, 559 F. Supp. 842 (W.D. Tex. 1982); Marquez v. Kiley, 436 F. Supp.100,109-114 (S.D.N.Y. 1977).

^{29/} Accord, Stewart, supra, 83 Col.L.Rev. at 1386-89.

b. The same is true of civil damage actions brought by citizens or lawful residents^{30/} pursuant to Bivens v. Six Unknown Named Agents of Federal Bureau of Narcotics, 403 U.S. 388 (1971). Bivens actions are expensive to bring, time consuming, not readily available, and rarely successful. Prior to bringing such an action, the citizen whose rights were violated must 1) be aware that the INS officer's conduct was unlawful,

^{30/} The government concedes, as it must, that undocumented aliens, particularly if they have been deported, are not likely to bring damage suits, (Pet. Br. 47). The complaint that "Bivens suits have become yet another tool in illegal aliens' never-ending quest for delay" (Id. n. 30), is unworthy of a government that often exercises its authority to detain deportable aliens as government witnesses in its own efforts to enforce the law. If its agents have violated the law, the government should not begrudge the honest effort to make them legally accountable to their victims. In rare cases where such actions are brought by deportable aliens, it is within a court's discretion to grant a stay of deportation to permit consultation with attorneys during the pendency of the Bivens suit, and just as surely within the court's discretion to deny a stay where there is an abuse of process.

2) find competent counsel willing to take the case, 3) be able to pay the costs of litigation, and finally 4) be willing to endure protracted proceedings. Once those obstacles are overcome, a favorable judgment is still quite unlikely.^{31/} INS officers have qualified immunity from liability for actions reasonably taken in "good faith." Under Harlow v. Fitzgerald, 457 U.S. 800, 818 (1983), INS officers are shielded from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." Moreover, juries are inclined to believe the testimony of law enforcement officers that they performed their duties in good faith because they

^{31/} See, e.g., Marquez v. Kiley, 436 F. Supp. 100, 105-109 (S.D.N.Y. 1977); Morales v. Hamilton, 391 F. Supp. 85 (D. Ariz. 1975); see also Gonzalez v. City of Peoria, 722 F.2d 468, 477-486 (9th Cir. 1983) (§1983 damages action unsuccessful against local police who detained aliens for INS investigation).

generally believe that the vast majority of officers are honest and endeavor to perform their jobs in a lawful manner.^{32/}

Because the government itself concedes that successful Bivens actions are relatively rare, its suggestion that the mere prospect of such suits being brought provides a "powerful disincentive to unlawful conduct" (Pet. Br.48) rings particularly hollow. Although Bivens actions do provide a disincentive for the grossest of constitutional violations,^{33/} they provide no comparable disincentive for closer cases.

^{32/} Stewart, supra, 83 Col.L.Rev. at 1387.

^{33/} See Carlson v. Green, 446 U.S.14,18-23 (1980)(Bivens suits and Federal Tort Claims Act (FTCA) actions provide parallel, complementary causes of action). Although Congress in 1974 amended the FTCA to create a cause of action for intentional torts committed by federal law enforcement officers, 28 U.S.C. §2680(h), the government does not rely here on the FTCA as an alternative to the exclusionary rule. For the reasons outlined in Carlson v.Green, supra, the FTCA primarily serves to compensate victims rather than to deter unlawful conduct by law enforcement officers.

Under a Bivens sanction, INS officers have no incentive "to err on the side of constitutional behavior," and may therefore reasonably decide to resolve close questions against compliance with the Fourth Amendment. See United States v. Johnson, 457 U.S. 537, 561 (1982). Furthermore, Bivens actions fail to provide INS with effective incentives to adopt general policies and procedures designed to conform officers' practices to constitutional requirements. Accordingly, Bivens actions do little, if anything, to reduce the likelihood of the vast majority of Fourth Amendment violations.

c. Reliance on internal rulemaking, training, and discipline requires self-policing, a laudatory goal, but one which, in the practical experience of other law enforcement agencies, has "rarely been effective in deterring Fourth Amendment violations." (Pet. App. 34a). The court

below found that INS had made a "commendable effort" to design a disciplinary system, but in the absence of any indication that it was being enforced declined to presume that the guidelines provided an effective deterrent (Pet. App. 35a). The court below properly placed the burden on INS to show that its internal procedures are more effective than the ineffective procedures of other law enforcement agencies. In any event, a closer scrutiny of such procedures fully supports their rejection as an adequate alternative.

The failure of the internal disciplinary system to stop even the most flagrant corruption and brutality has been sharply criticized by INS employees, the public, and the press.^{34/} Numerous deficiencies remain

^{34/} See, e.g., Crewdson, John, The Tarnished Door, Times Books, New York (1983) at 143-171, 208-212; U.S. Commission on Civil Rights, The Tarnished Golden Door, supra, at 117-129; "U.S. Immigration Service Hampered by Corruption," New York Times, Sunday, January 13, 1980, A 1:2; "Violence, Often Unchecked, Pervades U.S. Border Patrol," New York Times, Monday, January 14,

in INS internal disciplinary procedures despite some improvements since a Department of Justice audit discovered serious defects in the complaint process in 1977. Comparing INS internal complaint procedures with analogous procedures designed for the internal investigations units of police departments, the U.S. Commission on Civil Rights concluded in 1980 that "deficiencies remain in the INS complaint process that prevent an adequate response to public complaints of officer misconduct."^{35/} Four years later, INS has not yet revised its

1980, A 1:2, D 8:1 ("What emerges from their [officers'] accounts is a portrait of an agency often eager to keep its misdeeds hidden and, when it cannot, reluctant to administer more than token punishments to wrongdoers.")

^{35/} U.S. Commission on Civil Rights, The Tarnished Golden Door, supra, at 118-119. Where applicable, the recommendations of the National Advisory Commission on Criminal Justice Standards and Goals, the LEAA National Institute of Law Enforcement and Criminal Justice, and the Police Foundation were used as standards of comparison for evaluating the adequacy of INS's complaint investigating process.

written procedures to comply with the Commission's detailed findings and recommendations for improvements. Most serious among the procedural deficiencies found were the absence of adequate complaint notification requirements, the lack of an agency appeal mechanism for dissatisfied complainants, and the lack of adequate written standards for selection of investigators to handle misconduct cases.^{36/}

^{36/}Id. at 121-126. For example, if during the preliminary investigation a decision is made not to investigate further because the preliminary inquiry does not "reasonably support" the complaint of misconduct, the case is closed and the employee (and not the complainant) is notified. See INS Operations Instructions, reprinted in 4 Gordon and Rosenfield at 23-566.6-566.21 (1983), (OI) 287.10k(2); 287.10i (2)(a); 287.10m(2)(i), the evidentiary standard of "reasonable support" is not defined, and no guidelines are provided for applying it. The written procedures do not require INS to provide complainants with a description of the investigative process, and provide no appeal mechanism from decisions to close the inquiry. See OI 287.10. Moreover, the INS procedures fail to provide complainants with notice of the outcome of their complaints, regardless of whether or not they result in disciplinary action against an INS officer.

Even if the complaint procedures themselves were free of deficiencies, INS cannot possibly adequately monitor their effectiveness without adequate recordkeeping.^{37/} Yet INS compiles no identifiable statistics on the number of complaints or disciplinary actions involving Fourth Amendment violations by INS officers.^{38/} It therefore has no way of monitoring the effectiveness of its Fourth Amendment training program^{39/} or of

^{37/}Id. at 129.

^{38/} INS classifies such complaints as civil rights complaints, which include complaints regarding physical abuse and other criminal violations of civil rights statutes, see OI 287.10d, and destroys its records after an elapse of specified time periods. See OI 287.10j(3)(ii); OI 287.10o.

^{39/} Petitioner also relies on its current written policy -- outlined in its recently revised training manual, INS, U.S. Dept. of Justice, The Law of Arrest, Search, and Seizure for Immigration Officers at iv (Jan. 1983) -- of "erring on the conservative side when confronted with questionable search and seizure issues" by conforming its conduct to one or more lower court decisions (Pet. Br. 40-41). To be sure, these revised guidelines, which merely require INS agents to conform their behavior to current legal standards,

measuring the deterrent effect of the sanctions it might impose on its officers.

Adequate self-policing also depends in large part on the efficient reporting of complaints to INS by those citizens, residents, and undocumented aliens whose rights have been violated. The public remains inadequately informed of INS complaint procedures.^{40/} Without a realistic reporting structure or a system of incentives, few citizens or resident aliens

mark an improvement over earlier guidelines, which were severely criticized by courts as "sorely lacking in appropriate guidelines for agents" as well as being "misleading and inadequate." Illinois Migrant Council v. Pilliod, 398 F. Supp. 882,902 (N.D. Ill. 1975), aff'd, 540 F.2d 1062 (7th Cir. 1976), modified on rehearing en banc, 548 F.2d 715 (7th Cir.1977). Yet they can be effective only if enforced by imposing sanctions on officers for their violation, a process which does not appear to be taking place.

^{40/} U.S. Commission on Civil Rights, The Tarnished Golden Door, supra at 120 ("In spite of the importance of public awareness, no evidence was presented to the Commission of any formal INS program or systematic procedure to inform the public either of its right to file complaints or of the INS process and procedures for filing complaints.").

are likely to pursue such complaints by
INS 41/

More importantly, however, INS is unable to point to a single case since the 1979 BIA decision in Matter of Sandoval where an INS officer was disciplined solely for engaging in an unlawful search or seizure, despite widespread acknowledgement that such violations have taken place. 42/ INS's

41/ Few of those who are deported are likely to make such complaints.

42/ See discussion at pp. 90-100. In an attempt to show that "INS's disciplinary rules are not mere paper procedures," the best the government can produce is an INS report, specially requested for the government's brief, showing that "in the preceding four fiscal years, 20 officers have been suspended or terminated for misconduct affecting aliens." (Pet. Br. 45 n.28). Not one of these disciplinary cases, however, can be identified as involving Fourth Amendment violations. According to the report, 11 INS officers were terminated (or resigned prior to termination) for the following genuinely appalling misconduct: 3 for rapes of aliens; 3 for assaults on federal undercover officers posing as aliens; 2 (detention officers) for physically abusing and causing injury to detained aliens; 2 for physically abusing detainees; 1 for physically abusing a Mexican national applying for admission. The report contains no information regarding the circumstances underlying the 9 suspensions and 3 reprimands made

internal disciplinary procedures simply do not provide an adequate alternative to the exclusionary rule.^{43/}

over the last four years under the disciplinary procedures. Upon request, counsel for Petitioner provided us with a copy of the report, a memorandum dated February 17, 1984 from William J. Hannon, Program Analyst, to Walter P. Connery, Director, Office of Professional Responsibility regarding "Findings from Review of Substantiated Civil Rights Cases." (A copy of this memorandum has been lodged with the Court by Respondents.) Although we have asked for more information regarding the disciplinary actions involving suspensions and reprimands, counsel for Petitioner has informed us that it has no additional information regarding the disciplinary actions referenced in the memorandum.

^{43/} The government also erroneously argues that application of the exclusionary rule could have a chilling effect on the formulation of additional standards to govern INS investigative procedures, relying on United States v. Caceres, 440 U.S. 741 (1979). Reliance on Caceres is totally misplaced in this context. In Caceres, the Court held that exclusion of evidence would not be required by the failure of IRS to comply with its own regulations in obtaining the tape-recorded evidence where 1) IRS was not required by the Constitution or by statute to adopt any particular procedures or rules before engaging in consensual monitoring, and 2) none of the taxpayers' constitutional rights were violated. Here, by contrast, some kind of deterrent sanction is constitutionally required. E.g., United States v. Calandra, 414 U.S. at 348; Elkins v. United States, 364 U.S. at 217; Weeks v. United States, 232 U.S. at 393. Respondents seek enforcement of Fourth Amendment rights, not of an agency regulation. Moreover,

d. Finally, reliance on the INS practice of excluding evidence seized through intentionally or flagrantly unlawful conduct, under a Fifth Amendment due process rationale, merely reaffirms the compelling need for continued application of the rule in this context. Although better than nothing at all, such a due process rule is severely limited because it deters only the most "egregious" violations of Fourth Amendment rights, and has the additional disadvantage of failing to provide clear standards for determining when the suppression sanction should be applied.^{44/} In effect, it rewrites

application of the exclusionary rule in this context would tend to encourage, rather than chill, the formulation of additional internal procedures to ensure that officer conduct does not result in an unduly high rate of successful suppression motions.

^{44/} In the criminal context, the broad due process check on the conduct of law enforcement officers has been confined to the narrow category of cases in which the law enforcement officers have been brutal, employing against the defendant physical or psychological coercion that "shocks the conscience." See Irvine v. California, 347 U.S. 128, 132-133

the Fourth Amendment itself as it applies in the immigration context, protecting Hispanic Americans in general (and illegal aliens in particular) only from egregiously severe searches and seizures, and permitting unreasonable (but less severe) violations. Moreover, because the due process rule sanctions only deliberate constitutional violations, it may require inquiry into the subjective state of mind of the officer. It therefore does little to reduce the likelihood of violations "motivated by commendable zeal, not condemnable malice."^{45/} For those violations, a remedy is required to temper official enthusiasm in apprehending aliens with the need to comply with the dictates of the Fourth Amendment. Only the exclusionary rule provides a remedy adequate to safeguard these important values.

(1954); Rochin v. California, 342 U.S. 165, 172-174 (1952).

^{45/} See Stewart, supra, 83 Col.L.Rev. at 1389.

B. Application of the Exclusionary Rule
Will Not Unduly Impede INS
Enforcement Efforts, As Illustrated
By the Past and Present Practice of
Suppressing Tainted Evidence in
Deportation Proceedings

Two flaws fatally undermine the government's argument that the "costs of suppression in the deportation context are higher than our immigration system can afford." (Pet. Br. 23). First, in assessing the societal costs of suppression, the government less than candidly ignores the past and present Board of Immigration Appeals practice of suppressing evidence obtained in violation of Fourth and Fifth Amendment rights, as well as evidence obtained in violation of certain INS regulations. Second, the government relies on recently supplied non-record "facts," which are patently untrustworthy and inaccurate, as the sole basis for its assertion that the decision below has resulted in an increase in suppression motions which would "deal a grave

blow to the enforcement of immigration laws." (Pet. Br. 31). These attempts to provide the missing factual underpinnings for its arguments must be rejected.

1. The Exclusionary Rule's Application In Deportation Proceedings

INS has long operated in an investigative and prosecutorial regime in which evidence obtained through an illegal search or seizure may be suppressed in deportation proceedings. In August, 1979, however, in sharp departure from its longstanding practice, the BIA ruled that the exclusionary rule does not bar the INS from using evidence obtained in violation of the Fourth Amendment. Matter of Sandoval, 17 I. & N. Dec. 70 (BIA 1979) (JA 163). In February 1980, only six months after announcing its decision in Matter of Sandoval, the BIA returned to a limited rule of exclusion for cases in which "the manner of seizing evidence is so egregious that to

rely on it would offend the fifth amendment due process requirement of fundamental fairness." Matter of Toro, 17 I. & N. Dec. 340, 343 (BIA 1980).

a. Administrative history. Prior to the BIA's decision in Sandoval, the INS and the BIA had "accepted and applied the [exclusionary] rule . . . for many years and in countless cases since the dictum in U.S. ex rel. Bilokumsky v. Tod, 263 U.S. 149, 155 (1923), in which the Court assumed that "'evidence obtained . . . through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings.'" Matter of Sandoval, 17 I. & N. Dec. 70, 93 (Applemen, Bd. member, dissenting in part, concurring in part) (JA 194-95, 201). Accordingly, in pre-Sandoval cases, the BIA frequently reviewed rulings of immigration judges on motions to suppress evidence obtained in violation of the Fourth

Amendment.^{46/} In virtually all of the cases it reviewed, the BIA either found no illegality in the underlying arrest or detention^{47/} or concluded that there was

^{46/} E.g., Matter of Yau, 14 I. & N. Dec. 630, 632 (BIA 1974) ("The law realistically recognizes that on occasion some overzealous Government officials may overreach and may themselves violate constitutionally protected rights in obtaining evidence of wrongdoing on the part of others. The rule excluding such evidence (the exclusionary rule) is founded on sound principles of policy laid down long ago.") (Maurice A. Roberts, Chairman, concurring at 641-42). Under well-established procedures, a motion to suppress evidence in deportation hearings must be based on an offer of proof or affidavit, based on personal knowledge, setting forth a prima facie case of the illegality of INS actions. Matter of Wong, 13 I. & N. Dec. 820 (BIA 1971) (no prima facie case of illegal search and seizure established and therefore INS need not justify manner in which it obtained the evidence); Matter of Tang, 13 I. & N. Dec. 691 (BIA 1971) (no prima facie case established); Matter of Tsang, 14 I. & N. Dec. 294, 295 (BIA 1973) (rule concerning burden of proof for motions to suppress evidence "which is applied in criminal cases, has been adopted for use in deportation hearings").

^{47/} E.g., Matter of King and Yang, 16 I. & N. Dec. 502 (BIA 1978); Matter of Cachiquango and Torres, 16 I. & N. Dec. 205 (BIA 1977); Matter of Mejia, 16 I. & N. Dec. 6, 8 (BIA 1976); Matter of Burgos, 15 I. & N. Dec. 278 (BIA 1975); Matter of Yau, 14 I. & N. Dec. 630 (BIA 1974); Matter of Scavo, 14 I. & N. Dec. 326 (BIA 1973); Matter of Methure, 13 I. & N. Dec. 522 (BIA 1970); Matter of Au, Yin, and Lam, 13 I. & N. Dec. 294 (BIA 1969), aff'd, sub nom., Au Yi Lau v. INS, 445

independent, untainted evidence of deportability sufficient to uphold the deportation order.^{48/}

F.2d 217 (D.C. Cir. 1971), cert. denied, 404 U.S. 864(1971); Matter of Wong and Chan, 13 I. & N. Dec. 141 (BIA 1969), aff'd sub nom., Tit Tit Wong v. INS, 445 F.2d 217 (D.C. Cir. 1971), cert. denied, 404 U.S. 864 (1971); Matter of Doo, 13 I. & N. Dec. 30 (BIA 1968); Matter of Yam, 12 I. & N. Dec. 676 (BIA 1968), aff'd, Yam Sang Kwai v. INS, 411 F.2d 683,690 (D.C. Cir. 1969), cert. denied, 396 U.S. 877 (1969) (Wright, J., dissenting) ("In my view the statement was the fruit of an [illegal] seizure . . . and should not have been admitted."); Matter of Chen, 12 I. & N. Dec. 603 (BIA 1968); see also Matter of D M, 6 I. & N. Dec. 726,730 (BIA 1955) (exclusionary rule not applicable to local police, only to federal government).

^{48/} For example, in Matter of Perez-Lopez, 14 I. & N. Dec. 79 (BIA 1972), the immigration judge suppressed evidence obtained from an illegal search and seizure as the "fruit of the poisonous tree," and terminated the deportation proceedings. Later, the case was reopened based on an independent tip, and the resulting deportation order based on untainted evidence was upheld by the BIA, which explicitly rejected the notion that the prior application of the exclusionary rule resulted in an illegal alien achieving "what is tantamount to permanent residence merely because the service at one time may have acted illegally in assembling evidence of his deportability." Id. at 81.

We note that immigration decisions are reported only if decided by the BIA, and are generally available then only if designated for publication by the BIA. It is therefore likely that there are numerous unreported pre-Sandoval cases in which

Consistent with the above-described state of affairs, immigration law practitioners were informed by the major treatise in their field, authored by a former general counsel of INS, that "[i]t is undisputed . . . that the Fourth Amendment prohibition against unreasonable searches and seizures applies in deportation proceedings, and that evidence obtained as the result of

illegally obtained evidence was suppressed in an unappealed ruling by an immigration judge.

The BIA held in numerous other pre-Sandoval cases that the deportation orders were supported by sufficient untainted evidence, including admissions made at the deportation hearing, and therefore did not reach the question of the legality of the underlying search or seizure. See, e.g., Matter of Taerghodsi, 16 I. & N. Dec. 260 (BIA 1977), aff'd, Taerghodsi v. INS, 569 F.2d 1154 (5th Cir. 1978), cert. denied, 439 U.S. 829 (1978).; Matter of Castro, 16 I. & N. Dec. 81 (BIA 1976); Matter of Escobar, 16 I. & N. Dec. 52 (BIA 1976); Matter of Davila, 15 I. & N. Dec. 781 (BIA 1976); Matter of Bulos, 15 I. & N. Dec. 645 (BIA 1976); Matter of Rojas, 15 I. & N. Dec. 492 (BIA 1975); Matter of Cheung, 13 I. & N. Dec. 794 (BIA 1971); Matter of Methure, 13 I. & N. Dec. 522, 526 (BIA 1970); Matter of Wong and Chan, 13 I. & N. Dec. 141 (BIA 1969), aff'd sub nom., Tit Tit Wong v. INS, 445 F.2d 217 (D.C. Cir. 1971), cert. denied, 404 U.S. 864 (1971); Matter of T, 9 I. & N. Dec. 646 (BIA 1962).

the unlawful search cannot be used."^{49/}

In 1979, the BIA held, for the first time, that the Fourth Amendment exclusionary rule does not apply to deportation proceedings.^{50/} In Matter of Sandoval, supra, (J.A 163), the BIA first concluded that INS agents had violated Emma Sandoval's Fourth Amendment rights by a warrantless, nonconsensual search of her residence at 6:00 a.m. during an area control operation in New Rochelle, New York. Despite the Fourth

^{49/} 1A C. Gordon and H. Rosenfield, Immigration Law and Procedure §5.2c at 5-31 (rev. ed. 1977). Accord, J. Wasserman, Immigration Law and Practice, Joint Committee on Continuing Legal Education of the American Law Institute and the American Bar Association, at 77 (October, 1961) ("In deportation proceedings aliens are protected against illegal searches and seizures and may suppress evidence procured illegally").

^{50/} Despite the long history of applying the exclusionary rule in deportation proceedings, the BIA addressed the question as one of first impression in Matter of Sandoval because it could "find no decision in which the appropriateness of applying the rule in deportation proceedings is analyzed in any detail." (JA 171).

Amendment violation, the BIA refused to exclude the fruit of the illegal search and seizure, her statement and the I-213, "Record of Deportable Alien," prepared in conjunction with it. The BIA held, in essence, that because deportation proceedings are civil in nature, the INS could benefit from its own illegal conduct by using evidence that would otherwise be suppressed in a criminal proceeding (JA 175-176).

Six months after its decision in Sandoval, however, the BIA suppressed evidence obtained as a result of an illegal search and seizure in In re Rosa Ramira-Cordova, A 21 095 059 (February 21, 1980).^{51/} The search in Cordova occurred as part of an INS nighttime residential area control operation. The BIA concluded that

^{51/} This decision was not designated by the BIA for publication. However, a copy of the decision was attached by INS as "addendum 3" to its brief filed in the court of appeals in Lopez's case.

"cases may arise [such as this one] in which the manner of seizing evidence is so egregious that to rely on it would offend the Fifth Amendment's due process requirement of fundamental fairness," id. at 4, and ordered the deportation proceeding terminated because the unlawfully obtained evidence was the only evidence of deportability.^{52/}

In addition to post-Sandoval suppression of evidence obtained through "egregious" violations of Fourth Amendment rights, the BIA excludes from deportation proceedings evidence obtained in violation of 1) Fifth

^{52/} See also Matter of Toro, 17 I. & N. Dec. 340, 343 (BIA 1980) (BIA declined to suppress the evidence obtained as a result of an INS agent's Fourth Amendment violation where the agent was acting in accordance with INS policy prior to the Court's decision in United States v. Brignoni-Ponce, 422 U.S. 873 (1975)); In re Argentina Guevara-Benitez, A 22 552 166 (April 24, 1980) (remanding for further factual findings and a determination under Toro regarding "extremely serious" allegations that INS had illegally arrested Guevara based solely on her Latin appearance).

Amendment rights^{53/} and 2) certain INS regulations.^{54/}

In January 1981, Attorney General Civiletti declined to certify or reverse Matter of Sandoval pursuant to a request made under the provisions of 8 C.F.R. §3.1(h), which reserves to the Attorney General discretionary authority to review any BIA decision. Although he concluded that "the application of the exclusionary rule was not legally required," he announced a

^{53/} In Matter of Garcia, 17 I. & N. Dec. 319 (BIA 1980), the BIA excluded admissions made after the INS refused the alien's repeated requests to consult with a lawyer, held him incommunicado, and did not inform him of his right to a hearing. Because these involuntary admissions constituted the only evidence supporting deportability in that case, the deportation proceedings were terminated.

^{54/} In Matter of Garcia-Flores, 17 I. & N. Dec. 325,328 (BIA 1980), the BIA held that a violation of a regulatory requirement by an INS agent can result in evidence being excluded or proceedings invalidated where the regulation in question serves "a purpose of benefit to the alien" and the violation "prejudice[s] . . . interests [of the alien] that were protected by the regulation."

modification of internal policy with respect to violations of search and seizure law.^{55/} The Attorney General emphasized, however, that the new policy was not intended to "create or confer any private right enforceable at law or in equity against the United States or any agency or employee thereof."^{56/} Id. at p. 2.

^{55/} First, after noting the absence of a "consistent statement of the appropriate administrative discipline to be applied for search and seizure violations" the Attorney General outlined disciplinary measures for intentional, reckless, or negligent violations of law. Second, the Attorney General ordered the application of an internal rule for the most egregious violations of search and seizure law, in which the government will "voluntarily" exclude from any proceedings evidence which has been seized through intentionally unlawful conduct. See Memorandum of Jan. 16, 1981, from Benjamin R. Civiletti to Heads of Offices, Boards, Bureaus and Divisions, Violations of Search and Seizure Law.

^{56/} He thus retained the option to rely on illegally obtained evidence in deportation proceedings based on a review of the facts in each case, citing United States v. Caceres, 440 U.S. 741 (1979), where this Court declined to apply the exclusionary rule to evidence obtained in violation of agency regulations where the regulations were not required by the Constitution or by statute. Notwithstanding that retained discretion, it is plain that BIA must independently determine whether to admit the

b. Judicial history. Over sixty years ago, on the only occasion this Court has had to comment on the question raised by the instant case, it stated:

It may be assumed that evidence obtained by the [Labor] Department through an illegal search and seizure cannot be made the basis of a finding in deportation proceedings. Compare Silverthorne Lumber Co. v. United States, 251 U.S. 385; Gould v. United States, 255 U.S. 298.

United States ex rel. Bilokumsky v. Tod, 263 U.S. 149, 155 (1923). There was no need to reach the issue of suppression of the evidence in Bilokumsky because the Court held that there was no unlawful search or seizure.^{57/}

evidence. See United States ex rel. Accardi v. Shaughnessy, 347 U.S. 260 (1954).

^{57/} The Court in Bilokumsky also rejected the argument that the evidence was obtained in violation of administrative rules because "no rule is shown which prohibits interrogation without apprising the person under investigation that he is entitled to refuse to answer and to have counsel." Id. at 155-156. Bilokumsky's admission of alienage was obtained by a federal immigration officer during an interrogation held in prison, where Bilokumsky was confined by city

The federal courts which have confronted the question have all held that evidence illegally obtained by federal agents may not be admitted in subsequent deportation hearings. See Lopez-Mendoza and Sandoval-Sanchez v. INS, 705 F.2d 1059; Wong Chung Che v. INS, 565 F.2d 166,169 (1st Cir. 1977) (ordering a remand for an evidentiary hearing on the motion to suppress evidence obtained through an illegal search and seizure, stating that if the alien crewman's landing permit was obtained through an illegal search "there is no authority of which we are aware that would make it admissible");^{58/} Ex parte

authorities on charges that he had violated the state sedition law.

^{58/} The government erroneously states that the court in Wong Chung Che "suggested . . . that it would not follow the same rule in the case of oral statements . . . , which are what is at issue in the present cases." (Pet. Br. 17 n.10) Presumably, the government relies on the court's observation that "[w]hile wide latitude is permitted the government in introducing statements of arrested suspects, whether or not they might be suppressed in a criminal proceeding, we can think of no justification for

Jackson, 263 F. 110,112-113 (D. Mont.),
appeal dismissed sub nom. Andrews v. Jackson,
267 F. 1022 (9th Cir. 1920) ("the deportation
proceedings [were] unfair and invalid, in
that they [were] based upon evidence and
procedure that violate the search and seizure
and due process clauses of the
Constitution"); United States v. Wong Quong
Wong, 94 F. 832,834 (D. Vt. 1899) (the
"constitutional safeguards [of the Fourth
Amendment] would be deprived of a large part
of their value if they could be invoked only

encouraging the illegal searches of premises." 565
F.2d at 169. The court refers there to a line of
cases which have held that statements obtained without
full Miranda warnings, which would render them
inadmissible in a criminal proceeding, may under
certain circumstances be admitted in deportation
proceedings. Id. at 168. See, e.g., Chavez-Raya v.
INS, 519 F.2d 397 (7th Cir. 1975); Trias-Hernandez v.
INS, 528 F.2d 366,368 (9th Cir. 1975); see also Navia-
Duran v. INS, 568 F.2d 803 (1st Cir. 1977) (statement
must be voluntarily given). Those considerations are,
of course, distinguishable from the settled principle
that statements as well as physical evidence may be
suppressed as the product of a Fourth Amendment
violation. See Brown v. Illinois, 422 U.S. 590
(1975).

for preventing the obtaining of such evidence, and not for protection against its use.") Other courts have either expressly or implicitly assumed that the rule applies in their discussions of underlying Fourth Amendment issues.^{59/} Throughout the last century, not a single federal court has concluded that evidence tainted by an illegal search or seizure is admissible in

^{59/} E.g., Huerta-Cabrera v. INS, 466 F.2d 759,761 n.5 (7th Cir. 1972); Yam Sang Kwai v. INS, 411 F.2d 683,690 (D.C.Cir.1969), cert. denied, 396 U.S. 877 (1969) (Wright, J., dissenting) ("In my view the statement was the fruit of an [illegal] seizure . . . and should not have been admitted."); Klissas v. INS, 361 F.2d 529 (D.C. Cir. 1966); Vlissidis v. Anadell, 262 F.2d 398,400 (7th Cir. 1959); Schenck ex rel. Chow Fook Hong v. Ward, 24 F. Supp. 776,778 (D. Mass. 1938) (Writ of habeas corpus denied where contested evidence obtained in search of another detained alien; the court observed in dictum, however, that if evidence had been obtained in violation of his rights, it would not be admissible against him in criminal or civil proceedings).

More recently, courts have viewed the issue as an open question, but have not reached the issue because of underlying Fourth Amendment holdings that the evidence was lawfully obtained, e.g., Babula v. INS, 665 F.2d 293,301 n.4 (3d Cir. 1981) (Adams, J., concurring); Carnejo-Molina v. INS, 649 F.2d 1145,1149 n.3 (5th Cir. 1981).

deportation proceedings.

2. The Practical Effect of Suppression
Motions on Current INS Enforcement

Contrary to the government's assertions, applying the exclusionary rule in deportation proceedings will not unduly impede INS enforcement of immigration laws. When the "costs" assigned to the rule by the government are examined in light of the above described history, they pose neither an excessive nor unmanageable price to pay for the preservation of Fourth Amendment rights.

The government first points to the cost of permitting an illegal alien to go free, labelling it a "de facto judicial grant of resident status and immunity from the immigration laws." (Pet. Br. 24). But application of the exclusionary rule does not result in a grant of immunity from deportation. At any time, INS may proceed in deportation proceedings with untainted

evidence, even in the same proceeding ^{60/} As the pre-Sandoval administrative history establishes, INS has frequently been able to sustain its burden of showing that other evidence of deportability remains untainted by the official misconduct.^{61/}

Moreover, even where independent INS records or other untainted evidence are not immediately available, aliens who entered

^{60/} This Court has declined to adopt a "per se" or "but for" rule that would make inadmissible any evidence which comes to light through a chain of causation that began with an illegal arrest. Brown v. Illinois, 422. U.S. at 603 (1975) ("The workings of the human mind are too complex and the possibilities of misconduct too diverse, to permit protection of the Fourth Amendment to turn on such a talismanic test"). See also United States v. Ceccolini, 435 U.S. 268 (1978).

^{61/} See discussion and cases cited, supra, at p.68 n.48; see also, e.g., Carnejo-Molina v. INS, 649 F.2d at 1148-1149 (5th Cir. 1981); Babula v. INS, 665 F.2d at 301-303 (3d Cir.1981) (Adams, J., concurring); Katris v. INS, 562 F.2d 866, 868-869 (2d Cir. 1977); Medina Sandoval v. INS, 524 F.2d 658 (9th Cir. 1975); Huerta-Cabrera v.INS, 466 F.2d 759 (7th Cir. 1972); See generally 1A Gordon and Rosenfield, Immigration Law & Procedure, §5.2b, at 5-25, §5.10a at 116-117 (March 1983 Supp).

without inspection may be apprehended and deported through the use of untainted evidence, just as are other members of this "shadow population."^{62/} INS receives tips from informants who are ex-spouses, landlords, neighbors or co-workers, and uses this information to apprehend undocumented aliens. The fact that the undocumented alien was previously unlawfully arrested does not taint any subsequent proceeding.

Even if some few illegal aliens go free, and are not apprehended and deported through independent evidence, the costs of their release are not excessive. Most fundamentally, the "cost" is in fact simply the cost already mandated by the Fourth Amendment itself, which would have rendered the evidence (or the alien) unavailable had the INS complied with its familiar

^{62/} See Plyler v. Doe, 457 U.S. 202, 218 (1982).

requirements.^{63/} In any event, the number of aliens freed by application of the rule has in the past been statistically insignificant (Pet. App. 30a). Moreover, the cost to society of releasing an individual undocumented alien is significantly less than releasing, without punishment, a criminal who preys on individuals or society.^{64/} The

^{63/} See Stewart, supra, 83 Col. L. Rev. at 1392-1393.

^{64/} The few aliens who may go free and remain in this country as a result of the application of the exclusionary rule pose no collective economic threat to society, regardless of the positive or negative impact of the entire class of illegal aliens on the economy. The impact of the entire class of illegal aliens in the country has been a subject of considerable dispute. See, e.g., Developments in the Law: Immigration Policy and the Rights of Aliens, 96 Harv. L. Rev. 1286, 1441-43 (1983); see also Plyler v. Doe, 457 U.S. 202, 228 (1982). That debate, we agree, is one for Congress to resolve. It should be noted, however, that current legislative proposals, if enacted, would legalize the status of a large proportion of undocumented aliens in the United States. See S. 529, Section 301(a) adopted by the Senate on May 18, 1983; H.R. 1510, reported by the Committee on the Judiciary of the House of Representatives on May 5, 1983. Both the Attorney General and the Commissioner of Immigration and Naturalization have testified in favor of legalization provisions. See H.R. Rep. No. 98-115 at 87-88 (quoting testimony of Attorney General William French

government's suggestion (Pet. Br. 10) that the "licensing of continuing unlawful conduct is unparalleled in our jurisprudence," and unlike granting immunity for past criminal conduct, "offend[s] society's notions of justice and judicial integrity," stands the concept of "judicial integrity" on its head. The same rationale would condemn both the long-standing requirement of suppressing evidence obtained in violation of Fifth Amendment rights and the BIA's post-Sandoval due process rule of suppressing evidence obtained through egregious violations of the Fourth Amendment. Thus, if exclusion in fact constitutes a cost at all, it is a cost that

Smith in support of the legalization provision of H.R. 1510.) Thus, in another context, the government has taken a contradictory position with regard to whether illegal aliens harm our economy. (See Pet. Br. 10,24). The BIA itself conceded in Matter of Sandoval, 17 I.& N. Dec. at 80, that application of "the rule would not appear to have the potential to significantly impact on this country's immigration laws and policies." (JA 177).

the immigration system already bears under other constitutional requirements 65/

Recognizing that the substantive cost of exclusion is de minimis, the government relies instead largely on speculative damage to the immigration litigation system which may result from merely allowing suppression

65/ Contrary to the government's assertion, suppressing tainted evidence in deportation proceedings is simply not akin to suppression of an alien's "body." As in the criminal context, an illegal arrest does not invalidate subsequent judicial proceedings. E.g., United States ex rel. Bilokumsky v. Tod, 263 U.S. at 158; Katris v. INS, 562 F.2d 866,869 (2d Cir. 1977); Medina-Sandoval v. INS, 524 F.2d 658 (9th Cir. 1975).

The proceeding may be terminated without a deportation order, however, when the government fails to sustain its burden of proof. Because the government seeks to expel the alien from the country, the burden is on INS to prove deportability, see Gastelum-Quinones v. Kennedy, 374 U.S. 469 (1963), by "clear, unequivocal, and convincing evidence." Woodby v. INS, 385 U.S. 276 (1966). Only when the government sustains its burden of establishing alienage does the alien have the burden of proving time, place, and manner of entry. 8 U.S.C. §1361; See Corona-Palomera v. INS, 661 F.2d 814,816 (9th Cir. 1981); Iran v. INS, 656 F.2d 469,470 n.5 (9th Cir. 1981); see also Navia-Duran v. INS, 568 F.2d 803, 811 (1st Cir. 1977) (burden on INS to show that subject of deportation proceeding is a deportable alien).

motions to be brought. The government emphasizes the summary nature of most deportation proceedings and argues that any significant intrusion of complex constitutional questions will "overload the system to the point of breakdown." (Pet. Br. 28).

Contrary to the government's assumption, however, refusal to apply the Fourth Amendment exclusionary rule will not eliminate suppression motions from the deportation process. An alien who has succeeded in entering the country possesses a right to a hearing on the issue of deportability which must comport with Fifth Amendment guarantees of due process.^{66/} As outlined above, the BIA presently permits inquiry into allegations of egregious Fourth

^{66/} See, e.g., Bridges v. Wixon, 326 U.S. at 154 (1945); Kaoru Yamataya v. Fisher (The Japanese Immigrant Case), 189 U.S. 86 (1903); Wong Wing v. United States, 163 U.S. 228, 242 (1896) (Field, J., concurring in part and dissenting in part).

Amendment violations and excludes evidence where circumstances surrounding an arrest or interrogation would render admission "fundamentally unfair." In addition, the BIA permits inquiry into the voluntariness of admissions and excludes statements which are involuntarily given.^{67/} The BIA also excludes evidence obtained in violation of certain regulatory requirements. Elimination of Fourth Amendment suppression motions has not and cannot significantly reduce the burdens and delays the system already faces and has coped with in the past.

Furthermore, present BIA procedures for suppression motions address many of the concerns raised by the government. Contrary to the government's assertions, the agent's actions are presumed to be in accordance with

^{67/} See discussion and cases cited supra, at pp.72-73; see also, e.g., Navia-Duran v. INS, 568 F.2d 803 (1st Cir. 1977); Bong Youn Choy v. Barber, 279 F.2d 642 (9th Cir. 1960).

the law unless the subject of the deportation hearings makes an initial showing of illegality.^{68/} Only after a prima facie case of illegality is made does the burden shift to the government to show that the evidence was not obtained illegally, or that the connection between the lawless conduct and the discovery of the challenged evidence has become, under Wong Sun v. United States, 371 U.S. 471, 487 (1963), "so attenuated as to dissipate the taint." The government's fears that frivolous or dilatory suppression motions will divert the resources of the agency by requiring the presence of INS officers at hearings or necessitating a modification in record-keeping are accordingly groundless.^{69/}

^{68/} See discussion and cases cited at note 46, supra.

^{69/} If the INS were concerned about preparing an adequate response to nonfrivolous motions, it could easily require that suppression motions and supporting affidavits be filed prior to the hearing. Cf. 8 C.F.R. §287.4(a)(2) (procedures for obtaining subpoenas); 8 C.F.R. §242.16 (deportation hearing procedures).

In a last ditch attempt to establish that the court's decision below has resulted in a "dramatic increase" in suppression motions, the government relies on non-record figures assembled by INS for the purposes of Petitioner's Brief (Pet. Br. 29-30). Although acknowledging that the numbers supplied by INS represent "estimates" because INS did not keep count of such motions prior to January 16, 1984, the government fails to reveal the baseless nature of its "statistics." For cases which were not appealed to the BIA and were closed prior to 1984, records are generally not available.^{70/} Almost unbelievably, in light of this Court's settled practice of limiting

^{70/} Counsel for Petitioner has informed us that deportation hearings and decisions of immigration judges are not transcribed unless a BIA appeal is filed; untranscribed tapes are reused for other hearings. INS closed case files are often transferred to other offices, and no central depository of deportation case files exists which would permit an accurate review of closed files.

its consideration to facts properly grounded in the record, the government relies on facts (the number of suppression motions) which it told INS trial attorneys to reconstruct from memory.^{71/} The dimming of memories with the passage of time, staff turnover, and transfer of case files -- to say nothing of the obviously interested nature of this "research" --make comparison with the figures for the years before and after the decision impossible. At most, the only reliable conclusion that can be drawn is that some number of suppression motions were filed during the post-Matter of Sandoval period before and after the Ninth Circuit's decision, further demonstrating that the

^{71/} The INS method of reconstructing these figures by memory was explained to us only in response to our request, upon receipt of the typescript copy of Petitioner's brief, that similar data be assembled for the pre-Sandoval years 1977 and 1978. Counsel for Petitioner declined to do so, informing us that it would be impossible to reconstruct the information for the reasons outlined above.

Sandoval decision of 1979 did not eliminate the filing of suppression motions in deportation proceedings. Abandonment of the rule has not and will not result in the elimination of such motions, and cannot therefore appreciably change the nature of deportation hearings.

- C. The Social Costs Of Abandoning The Rule Are Excessive, Leading To Wholesale Violations Of The Fourth Amendment Rights Of Discrete Racial And Ethnic Minorities.

The unrestrained exercise of federal authority in enforcing immigration laws infringes the rights of those most vulnerable to INS abuses, members of the same racial or ethnic communities where the targets of INS enforcement actions -- illegal aliens -- live and work. The broad Congressional power to decide which aliens to admit, and to subject those admitted to questioning concerning

their right to be and remain in this country, "cannot diminish the Fourth Amendment rights of citizens who may be mistaken for aliens." United States v. Brignoni-Ponce, 422 U.S. at 884. Unless INS officers are effectively checked by the Fourth Amendment, however, immigration law enforcement pressures inevitably lead to violations of the constitutional rights of law abiding citizens and permanent residents, as well as those of undocumented aliens.

During the last several decades, Latin America and Asia have supplanted Europe as the major source of immigrants to the United States, and for more than twenty years, Mexico has been the country which has supplied the largest number of legal immi-

grants.^{72/} That pattern has also been reflected in illegal immigration. The 1980 census counted approximately 2 million illegal aliens, of which 63.6% were from countries in Latin America, including Mexico.^{73/} In contrast, the 1980 census counted a total of 14.6 million persons of Hispanic ancestry in the United States.^{74/}

INS enforcement actions have increasingly focused on apprehending illegal Mexican immigrants. Mexicans comprised 93%

^{72/} Passel and Warren, Estimates of Illegal Aliens from Mexico Counted in the 1980 United States Census, U.S. Bureau of the Census, Washington, D.C. (1983) at p. 1.

^{73/} Id. at pp. 8-9. Of the 2 million illegal aliens counted in the 1980 census, 931,000 (or 45.5%) were from Mexico. Id. Current data suggests that the number of illegal Mexicans in the United States "is substantially less than many of the earlier conjectural estimates, with a realistic upper bound of no more than 4 million and with the probable total number being even less." Id. at 2.

^{74/} U.S. Census Bureau, Publication PC 80-1-B1 General Population Characteristics, United States Summary, Table 39 at 1-2 (May 1983).

of all deportable aliens apprehended in 1979.^{75/} Although the overwhelming majority of illegal aliens seized are found as a result of border operations, the INS also conducts "area control operations," factory and neighborhood raids designed to apprehend aliens who are presently residing within the United States in violation of immigration laws.^{76/}

In the course of both its border operations and area control operations, INS inevitably encounters numerous citizens and lawful residents of Mexican or Hispanic ancestry. Even in border states, a relatively small proportion of persons of

^{75/} INS, 1979 Annual Report at 3.

^{76/} According to INS, in 1979, border patrol agents located 888,729 deportable aliens. Of that total, border patrol agents in the Chula Vista sector alone located 337,930 or over 31% of the deportable aliens apprehended for the year. In contrast, area control investigators located a total of 187,689 deportable aliens nationwide, of whom 100,087 or 53% were employed. Id. at 3,5.

Mexican or Hispanic ancestry are aliens.^{77/} According to the 1980 census, in California, approximately 70% of the state's Hispanic population are citizens.^{78/} In Texas, 88% of the total Hispanic population are citizens,^{79/} and in Washington, where Respondent Sandoval was apprehended, 85% of the Hispanic population of the state are

^{77/} See U.S. v. Brignoni-Ponce, 422 U.S. at 886 n.12. According to the 1980 census, about 1.2 million registered legal resident aliens are from Mexico, and about 201,000 naturalized citizens are originally from Mexico. See Passel and Warren, supra, at 5,7-8.

^{78/} Of the total population of 23.6 million persons in California, 4.5 million are of Hispanic ancestry, and 1.3 million of that number are non-citizens. See 1980 Census of the Population, Vol. 1, Characteristics of the Population, Ch. D, Detailed Population Characteristics, Part 6, California, Section 1, Table 194. According to INS figures, there were 513,086 registered aliens from Mexico in California in 1979. INS, 1979 Annual Report at 18.

^{79/} Of the total population of 14.2 million persons residing in Texas, 2.98 million are of Hispanic ancestry, of that number, approximately 370,000 are non-citizens. Id. at Part 45, Texas, Section 1, Table 194. According to INS figures, there were 291,193 registered aliens from Mexico in Texas in 1979. INS, 1979 Annual Report at 18.

citizens.^{80/} Because large numbers of native-born and naturalized citizens have the physical and linguistic characteristics identified with Mexican or other Latin American ancestry, they may easily be, and frequently are, mistaken for aliens.

These citizens are already, at a minimum, subjected to a heightened degree of suspicion and scrutiny by INS officers, solely because of their race. The role which racial and ethnic appearance inevitably plays in INS officers' enforcement decisions adds significant equal protection overtones to what is essentially a Fourth Amendment problem. As cautioned in Marquez v. Kiley, 436 F. Supp. at 113-114,

. . . The spectre of INS

^{80/} Of the total population of 4.1 million persons residing in Washington, 121,286 are of Hispanic ancestry, and 17,212 are non-citizens. Id. at Part 49, Washington, Section 1, Table 194. According to INS, there were 5,156 registered aliens from Mexico in Washington in 1979. INS, 1979 Annual Report at 18.

investigators cruising through neighborhoods where large numbers of foreign-born people are known to reside and work in search of people who 'look like' aliens, engaging many, if not most, in detentive stops and transporting to INS headquarters those who cannot provide on-the-spot documentation of various personal circumstances, is fundamentally offensive to this nation's historical concepts of proper law enforcement techniques."

If, in addition, the deterrent sanction of the exclusionary rule is abandoned, the careful balancing of Fourth Amendment protections and law enforcement needs which have been structured by the Court will be lost. Hispanic Americans will be relegated to separate conditions of existence, with significantly less privacy and security than other Americans, solely because of their racial or ethnic identity with the primary targets of INS enforcement.

On a day-to-day level, that means that if Mexican Americans forget to carry identification the day of an INS sweep of

their neighborhood or workplace, or speak English poorly, they may suddenly find themselves locked up in INS detention facilities^{81/} or mistakenly sent to another country^{82/}. Even if they do carry

^{81/} See generally, e.g., Crewdson, J., The Tarnished Door, supra n.34, at 212-213, 226-227 (when a school board member in Southern California was accosted by an INS agent while walking near her home, she protested that she was not only a citizen, but also an elected official; the agent told her, "You Mexicans are all a bunch of liars" and threw her into his cruiser.); "Roundup of Aliens Meeting Problems", New York Times, Friday, April 30, 1982, A:10:1 (Maria Esther Aguayo, a 21 year old naturalized citizen who lives in Colorado said she and a friend who had permanent resident status were arrested in a raid in a nightclub. She said: "I kept telling them, 'I'm an American citizen; but they just laughed at me and said, 'You're going home. You're a wetback and you're going home.'")

^{82/} See generally, e.g., Crewdson, J., The Tarnished Door, supra, at 170, 212-214 (American citizen, born in Puerto Rico, was sent to Guatemala when when INS decided his accent was Guatemalan and his papers must be forged. In Guatemala, without money or a passport, he soon found himself in jail); "Baby, Deported by U.S., Is Being Returned," New York Times, Sunday, November 14, 1982, A:28:6 (U.S. citizen baby deported to Mexico in raid by INS). See also "Teen-Ager Deported By Mistake Is Found," New York Times, Tuesday, February 21, 1984 at p. A:16:5 (15 year old resident alien from Santa Ana found after being sent to Tijuana by INS).

documentation of citizenship, they may not be believed. For example, in dragnet sweeps of certain neighborhood bars in El Paso, Texas, carried out in early 1982, the INS arrested and detained an American citizen who produced valid documents establishing his citizenship; the interrogating INS officer discredited their authenticity because he spoke no English.^{83/} Cases like these and others demonstrate that law-abiding Americans of Hispanic descent are now, and will be in the

^{83/} See Mendoza v. INS, 559 F. Supp. 842, 845 (W.D. Tex. 1982). As found by the district court, the sweeps were conducted in an area frequented mainly by persons of Mexican descent and carried out in the following manner:

At each establishment, several INS agents, accompanied by several [city police] officers, burst unannounced, without warrant and without valid consent, into the bars, stopped the music, guarded the doors so that it was apparent to those inside the bar that no one could leave without permission of the officers, stopped bar service, made the patrons be seated or line up against the wall, randomly interrogated both patrons and employees in the bars as to their citizenship, concentrated on those of obvious Mexican descent, and searched other (sometimes private) areas of the establishments.

future, subjected to arbitrary and offensive intrusions by officials who suspect them of being undocumented aliens.^{84/}

Given the long history of applying a rule of exclusion in deportation proceedings, and the substantial enforcement duties now faced by INS, abandonment of the rule at this time, without the existence of equally effective alternatives, would inevitably lead to an "open season" on Hispanic Americans, resulting in the wholesale violation of Fourth Amendment rights based on racial or ethnic appearance. As this Court cautioned in Almeida-Sanchez v. United States, 413 U.S. 266, 273 (1973), "[i]t is precisely the

^{84/} See generally U.S. Commission on Civil Rights, The Tarnished Golden Door: Civil Rights Issues in Immigration (1980) at 82-94, 94 (complaints of violations of citizens rights by INS examined and finding made that INS area control operations sometimes utilize ethnic appearance alone as basis for interrogation, and that such procedures "can and do in some instances result in persons, including U.S. citizens and residents, being subjected to unconstitutional searches and seizures."); see also cases cited at notes 9, 28, supra.

predictability of [the pressures of enforcing immigration laws] that counsels a resolute loyalty to constitutional safeguards."

II. INS VIOLATED THE FOURTH AMENDMENT IN THIS CASE

The court of appeals correctly ruled below that 1) Respondent Sandoval's detention at the police station violated the Fourth Amendment because it constituted an arrest not based on probable cause, and 2) the admissions he made there were a product of the illegal arrest. Because no factual findings were made by the immigration judge regarding the Fourth Amendment issues raised in Respondent Lopez's case, the court below properly remanded the case for further administrative proceedings consistent with its decision in Sandoval's case.

INS did not seek review of the underlying Fourth Amendment ruling in these cases (Pet. at i, 20n.14). In view of that

decision, the government waived its right to challenge that ruling here.^{85/} Accordingly, the government may not now be heard to complain that "[a]pplication of the exclusionary rule to a case like [the present one] . . . is not likely to 'deter' official misconduct, since it appears that none in fact occurred" (Pet. Br. 34-35). As this Court observed in United States v. Janis, 428 U.S. at 443, "the issue of admissibility of evidence obtained in violation of the Fourth Amendment is determined after, and apart from, the violation."^{86/}

Nevertheless, in light of the government's argument, we address here the substantial Fourth Amendment violation in

^{85/} Cf. Blum v. Stenson, -- U.S. --, No. 81-1374, slip. op. at 4 n.5 (March 21, 1984) (failure to raise claim below bars its consideration here).

^{86/} See Illinois v. Gates, --- U.S. ---, 76 L.Ed.2d 527, 539 (1983) (declining to address applicability of rule where substantive Fourth Amendment issues are dispositive).

this case. In Sandoval's case (see pp. 1-7, supra), an INS agent pulled him out of line when he was in the process of entering his workplace, locked him in a men's restroom, and transported him to a police station for interrogation. INS attempted to deport him based on the statements he made to agents while detained at the police station. His custodial questioning was supported by nothing other than 1) the presumption that he reacted in a "furtive" manner in the presence of officials (i.e. avoiding eye contact, not responding to questions in English such as "Make a lot of money here?", or looking "dumb") and 2) his "foreign appearance." Regardless of when the INS agents placed him under arrest, there can be no doubt that Sandoval was "seized" within the meaning of the Fourth Amendment when he was locked in the men's restroom and then involuntarily transported to the police station. Dunaway

v. New York, 442 U.S. 200, 216 (1979); Brown v. Illinois, 422 U.S. at 605; Davis v. Mississippi, 394 U.S. at 726-727. Whether or not factors such as foreign appearance and failure to respond to questions in English may justify a brief investigatory detention, an issue not raised by these facts,^{87/} they certainly do not amount to probable cause for arrest.^{88/} Because the statements made by

^{87/} See International Ladies Garment Workers' Union v. Sureck, 681 F.2d 624, cert. granted sub nom. INS v. Delgado, No. 82-1271 (argued January 11, 1984). The Court has applied a "reasonable suspicion" standard to narrow categories of cases in which the nature of the intrusion is much more limited. In Brignoni-Ponce, for example, the Court applied the analysis outlined in Terry v. Ohio, 392 U.S. 1 (1968), to roving border patrol stops of automobiles to check for illegal aliens. However, those investigative stops usually lasted less than a minute and involved a brief question or two. The Court cautioned that "any further detention or search must be based on consent or probable cause." United States v. Brignoni-Ponce, 422 U.S. at 881-882; Accord, United States v. Martinez-Fuerte, 428 U.S. at 567 (fixed checkpoint); see also Benitez-Mendez v. INS, 707 F.2d 1107 (9th Cir. 1983). Here that standard was not met.

^{88/} Arrests under the immigration laws have long been held to require probable cause. See, e.g., Au Yi Lau v. INS, 445 F.2d 217 (D.C. Cir.), cert. denied, 404 U.S. 864 (1971); La Franca v. INS, 413 F.2d 686 (2d

Sandoval during the illegal detention were, under Brown v. Illinois, supra, "obtained by exploitation and illegal arrest," they therefore were tainted by the agent's illegal conduct, and subject to suppression.^{89/}

In Respondent Lopez's case, the government correctly notes that the Fourth Amendment issue has not yet been determined,

Cir. 1969); Yam Sang Kwai v. INS, 411 F.2d 683 (D.C. Cir.), cert. denied, 396 U.S. 877 (1969). Probable cause exists when the facts and circumstances within the arresting officer's knowledge are sufficient to warrant a prudent person's belief that an offense has been or is being committed. See Cabral-Avila v. INS, 589 F.2d 957 (9th Cir. 1978), cert. denied, 440 U.S. 920 (1979).

^{89/} Although the government contends that the "record in Sandoval's case, fairly read, reveals that the only aliens transported to the police station were those who admitted their unlawful aliange at the plant" (Pet. Br. 35), the en banc panel of the court of appeals concluded otherwise, and for good reason. See Statement of the Case, supra at 2-4. Officer Bower merely testified that "a lot" of those initially detained for further questioning were questioned at the plant prior to transporting them to the police station for further processing (JA 140). He could not recall questioning Respondent Sandoval prior to his interrogation at the police station. (JA at 135-38, 140).

but erroneously maintains that "the administrative record seems quite adequate to demonstrate that an admission of alienage was made during a non-seizure encounter, and accordingly that there was no violation of Lopez's Fourth Amendment rights." (Pet. Br. 34). Respondent Lopez made three arguments below, each of which requires further factual findings: 1) that the agents' concededly unconstitutional warrantless and nonconsensual entry of Lopez's workplace violated his Fourth Amendment rights because he had a legitimate expectation of privacy in his workplace;^{90/} 2) that the agents had his

^{90/} The government argued for the first time in the court of appeals that Lopez lacked "standing" to challenge the legality of the agents' warrantless search of his workplace under Rakas v. Illinois, 439 U.S. 128,140 (1978). Although the BIA's 1979 decision in Lopez's case was issued over ten months after Rakas, the government made no attempt to brief the issue there. INS therefore waived its right to raise that issue in the court of appeals under Steagald v. United States, 451 U.S. 204, 208-11 (1981). In any event, whether an individual has a legitimate expectation of privacy in the location subject to government intrusion turns on the particular facts of

name prior to entering the shop and, because there were no exigent circumstances, should have obtained a warrant for his arrest prior to their entry;^{91/} and 3) that even under the government's version of the facts, the initial investigatory stop for questioning was not supported by reasonable suspicion of illegal alienage and was therefore unlawful.^{92/} The government's argument

each case. Rakas, supra, 439 U.S. at 148-49. The answer here depends on a variety of factors, including whether Lopez was legitimately on the premises, whether he took precautions to protect his privacy, whether he used the location in a way which implied a subjective expectations of privacy, whether he had a right to exclude others, and the societal and historical expectation of privacy under the circumstances. Id. at 150-153 (Powell, J., concurring). Since there was no factual hearing on these issues below, the court of appeals appropriately remanded the case for further findings and a resolution of these issues by the BIA.

^{91/} The statutory authority for INS agents to make warrantless arrests, 8 U.S.C. § 1357(a)(2), presupposes that warrants are required unless there is insufficient time in which to obtain one.

^{92/} Even if the INS agents' testimony were uncontroverted, they did not have a reasonable suspicion based on "specific articulable facts" prior to questioning to believe Respondent Lopez was an

addresses only one of the grounds for Lopez's suppression motion--the illegal detention issue--and presupposes factual findings supporting its version of events.

Determination of the other two grounds for suppression also require factual findings addressing the issues of Lopez's expectation of privacy on the premises, and his offer of proof regarding the illegality of his warrantless arrest.

A remand for further proceedings was therefore the only appropriate action in Lopez's case, unless the court had been willing to resolve the disputed facts in Lopez's favor because he was not allowed to make a complete record below. Cf. Blum v. Stenson, supra.

In sum, as found by the court of

illegal alien. The underlying legal standard applied to the disputed facts is before the Court this term in INS v. Delgado, supra.

appeals, the underlying Fourth Amendment violation in this case involves at worst a flagrant disregard of probable cause requirements, and at best a reckless failure by INS to follow a plan embodying explicit neutral limitations on the conduct of individual officers. See Brown v. Texas, 443 U.S. at 51; Delaware v. Prouse, 440 U.S. 648 (1979). Under either view, the danger posed by such a violation -- especially if, undeterred by the exclusionary rule, it frequently recurs -- is that law-abiding persons with physical characteristics of those of Mexican ancestry, for that reason alone, will have their privacy and security intruded upon at the unbridled discretion of INS officers.

CONCLUSION

The judgments of the court of appeals should be affirmed.

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In the Supreme Court of the United States

OCTOBER TERM, 1983

IMMIGRATION AND NATURALIZATION SERVICE, PETITIONER

v.

ADAN LOPEZ-MENDOZA AND ELIAS SANDOVAL-SANCHEZ

ON WRIT OF CERTIORARI TO THE UNITED STATES
COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE PETITIONER

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The central thesis of our opening brief was that the court of appeals erred in extending the exclusionary rule to civil deportation proceedings in the absence of any demonstrated need for such a severe "remedy" or any convincing evidence, whether empirical or intuitive, that the rule would have its intended deterrent effect in the deportation context. The court compounded its error by failing to consider the heavy systemic costs that its decision would impose on the administrative and judicial deportation process. Respondents have failed to refute our arguments. They are unable to demonstrate the existence of any significant pattern or practice of Fourth Amendment violations by INS agents, nor are they able to show that the exclusionary rule is likely to exert a meaningful deterrent impact on the conduct of those agents. Moreover, their attempt to downplay the significance of the costs of the lower court's ruling is unpersuasive.

We address these central points below. Preliminarily, however, it is necessary to clear away some of the rhetorical excesses that permeate respondents' brief.

1. Respondents repeatedly assert that application of the exclusionary rule in deportation proceedings is essential to protect Hispanic Americans from being "inexorably . . . swept into a net of suspicion, humiliation and fear" (Br. 32; see also Br. 28-32, 90-100). They make the totally unsupported assertion that, absent the exclusionary rule, INS agents would "inevitably intensify dragnet techniques" so that the "Fourth Amendment rights of Hispanic Americans would suffer a crippling blow" (Br. 31).¹

It is not surprising that respondents fail to offer even a shred of support for these ad hominem assertions. In reality, INS goes to great lengths to ensure that Hispanic Americans are *not* adversely affected "solely because of their race" (Br. 30). Immigration officers are instructed that they should have a reasonable suspicion of alienage before they may engage even in non-detentive questioning. INS, U.S. Dep't of Justice, *The Law of Arrest, Search, and Seizure for Immigration Officers* 3 (Jan. 1983) [hereinafter cited as *INS Handbook*]. "Reasonable suspicion of alienage" may *not* be based solely on racial factors (*ibid.*):

¹ Even if there were the slightest foundation for respondents' assertions that failure to apply the exclusionary rule in deportation proceedings would lead to "open season" on the Fourth Amendment rights of Hispanic Americans, which there is not, respondents are hardly the proper parties to represent such interests. Respondents are *not* Hispanic Americans; they are illegal aliens. Both respondents admitted their unlawful presence in this country (J.A. 99-101; Pet. App. 101a, 112a); to the extent that respondents' brief (at 5, 11) may be read as suggesting otherwise, it is totally lacking in record support. Respondents have never before contended that their admissions of illegal alienage were incorrect; their only challenge was to the use of those admissions because of the allegedly unlawful arrests that preceded them.

This suspicion must be based on more than ethnic physical appearance, e.g., Mexican or Chinese ancestry. This "reasonable suspicion" must be based on "specific articulable facts"—particular characteristics or circumstances which the officer can, if called upon, describe in words—such as foreign manner of dress or grooming, apparent inability to speak English, officer's knowledge of a high concentration of aliens in the area, or a specific tip from an informant.

This policy with respect to non-detentive questioning is followed notwithstanding the fact that no person is constitutionally protected against having questions addressed to him by law enforcement officers in public places. See, e.g., *Florida v. Royer*, No. 80-2146 (Mar. 23, 1983), slip op. 5-6; *Terry v. Ohio*, 392 U.S. 1, 34 (1968) (White, J., concurring).² Thus, respondents' professed concern that Hispanic Americans will be swept indiscriminately into "intrusive and arbitrary INS workplace raids and neighborhood dragnets" (Br. 30 (footnote omitted)) is grossly overstated.

What is particularly striking is respondents' inability to point to any widespread abuses of the Fourth Amendment rights of Hispanic Americans (or illegal aliens) in the period following the BIA's decision in *Matter of Sandoval*, 17 I. & N. Dec. 70 (1979) (J.A. 163-202). While we dispute respondents' contention that *Matter of Sandoval* was a sharp break with the realities of prior immigration law (see pages 6-8, *infra*), respondents have utterly failed to show that that decision resulted in increased Fourth Amendment violations by immigration officers. Absent such a demonstration, the logical conclusion to be drawn is that the supposed "abandonment" of the exclusionary rule in deportation proceedings had no

² With respect to detentive questioning, INS requires its agents to have a reasonable suspicion of *illegal* alienage (*INS Handbook* 3). And to make an arrest, the agents must of course have probable cause (*id.* at 4).

effect whatsoever on the Fourth Amendment rights of Hispanic Americans.³

³ Respondents do make the assertion that "[p]atterns of INS conduct in reported cases evidence widespread Fourth Amendment violations by immigration officers" (Br. 30 n.9). But the handful of cases respondents cite do not demonstrate "widespread" violations, and they certainly do not indicate any increase in violations in the post-*Matter of Sandoval* period. *INS v. Delgado*, cert. granted, No. 82-1271 (argued Jan. 11, 1984), is a rather poor choice to illustrate respondents' point, given that this Court has under submission the question whether any Fourth Amendment violation even occurred. *LaDuke v. Nelson*, 560 F. Supp. 158 (E.D. Wash. 1982), appeal pending, No. 83-3608 (9th Cir.), involved a challenge to INS procedures used to inspect farm labor housing units in search of illegal aliens. The district court noted that the challenged procedures were discontinued in 1979 (560 F. Supp. at 161-162) and had not been resumed at the time of decision in 1982 (*id.* at 164). The discontinuance was ordered by former Attorney General Civiletti three months after the BIA's decision in *Matter of Sandoval*, *supra*. Obviously, the Attorney General did not view the BIA's decision as an incentive to declare "open season" on Hispanic Americans. Moreover, the district court's decision that Fourth Amendment violations had occurred rested largely on the reasoning of the Ninth Circuit now under review by this Court in *Delgado* (see 560 F. Supp. at 162-163). *Marquez v. Kiley*, 436 F. Supp. 100 (S.D.N.Y. 1977), involved a challenge to "Area Control" operations, in which INS agents went to areas believed to contain large populations of illegal aliens and questioned suspected aliens as to their status. The plaintiffs sought damages and declaratory and injunctive relief. Their claim for damages was denied, the district court holding that the agents acted reasonably in detaining one plaintiff and arresting another (436 F. Supp. at 107-109). The court granted declaratory relief, but it declined to issue an injunction because "Area Control" operations had been voluntarily discontinued in 1973 (*id.* at 109, 114). Even as to the grant of declaratory relief, the court noted that the "issue is not free from doubt" (*id.* at 114) and recognized that its decision was contrary to the decisions of several courts of appeals (*id.* at 112). In *Mendoza v. INS*, 559 F. Supp. 842 (W.D. Tex. 1982), the court clarified its preliminary injunction to make it consistent with pre-existing agency policy, holding that INS agents need not have a reasonable suspicion of *illegal* alienage before engaging a person in non-detentive questioning and that "INS agents have the same right to enter [commercial] premises that any other person has," *i.e.*, without a warrant and without reasonable

To be sure, the fact that Hispanic Americans share the physical characteristics of vast numbers of illegal aliens undoubtedly means that, unless immigration enforcement is to be entirely abandoned, some Hispanic Americans will on occasion find themselves questioned concerning their status. But Hispanic Americans are no different in this regard from the law-abiding residents of inner-city, high-crime neighborhoods, who must inevitably experience more frequent encounters with the police than their suburban counterparts. To acknowledge that such encounters will occur, however, does not in any way suggest that they will be attended by frequent or serious violations of the Fourth Amendment.⁴

To the extent that occasional mistakes may occur—and what is most striking is their apparent infrequency for

suspicion that illegal aliens are present. 559 F. Supp. at 851-852. Although certain aspects of the search for aliens at issue in *Mendoza* may have violated agency policy, there is no suggestion in the opinion that the incidents in that case were indicative of a widespread pattern of abuse. Finally, the district court's injunction in *Illinois Migrant Council v. Pilliod*, 398 F. Supp. 882 (N.D. Ill. 1975), was affirmed by an equally divided en banc court (548 F.2d 715 (7th Cir. 1977)), but only after the injunction was modified to permit non-detained questioning even in the absence of reasonable suspicion of illegal alienage (*ibid.*). In any event, the most serious problems found by the district court, relating to "Area Control" operations and warrantless entries into residences, have been voluntarily discontinued by INS on a nationwide basis. See page 11. *infra*.

⁴ Respondents' citation (Br. 97 nn.81-82) of books and newspaper articles recounting a handful of incidents in which citizens or lawfully-present aliens were apprehended by INS not only fails to show anything approaching the widespread pattern of police misconduct that moved the Court to extend the exclusionary rule to state criminal trials in *Mapp v. Ohio*, 367 U.S. 643 (1961), but does not support the conclusion that the Fourth Amendment rights of even those few persons were violated. As the Court reaffirmed in *Illinois v. Gates*, No. 81-430 (June 8, 1983), slip op. 16, 19-20, the concept of probable cause deals with probabilities, not certainty. Respondents have not shown that the apprehensions they cite were unsupported by probable cause.

any agency that apprehends over one million deportable aliens each year—Hispanic Americans are the persons best situated to make use of the alternative remedies, such as *Bivens* suits, actions for declaratory or injunctive relief, or complaints to the agency. See pages 15-20, *infra*. The exclusionary rule, on the other hand, obviously does nothing to protect the rights of citizens and lawfully-present aliens directly, since they will never be subjected to deportation proceedings. Hispanic Americans would benefit from the exclusionary rule only if it were shown to have the deterrent effect that respondents claim for it; but as we demonstrated in our opening brief (at 37-39) and as we discuss below (see pages 12-13, *infra*), the rule simply will not have the intended effect in the deportation context.

2. Respondents' arguments concerning the deterrent impact of the exclusionary rule in the deportation context depend entirely for their validity on the premise that, save for the period between the BIA's decision in *Matter of Sandoval*, *supra*, and the court of appeals' decision below, "INS has long operated in an investigative and prosecutorial regime in which evidence seized through an illegal search or seizure may be suppressed in deportation proceedings" (Br. 65). Respondents repeatedly refer to the "long history of *applying* the exclusionary rule to deportation proceedings" (Br. 45 (emphasis added)). See also, *e.g.*, Br. 47, 70 n.50, 99. If conditions were as respondents imagine them to have been—widespread Fourth Amendment violations by INS combined with an active exclusionary rule remedy in deportation proceedings prior to 1979—it is virtually inconceivable that reported decisions would not reflect abundant litigation and frequent applications of the suppression remedy. In fact, however, it is clear that the exclusionary rule has never been a meaningful feature of deportation proceedings.

Most telling is the fact that, prior to the decision below, the exclusionary rule was applied by federal courts

reviewing deportation proceedings in only three reported cases. *United States v. Wong Quong Wong*, 94 F. 832 (D. Vt. 1899); *Ex parte Jackson*, 263 F. 110 (D. Mont.), appeal dismissed, 267 F. 1022 (9th Cir. 1920); *Wong Chung Che v. INS*, 565 F.2d 166 (1st Cir. 1977). Quite clearly, a rule that has been applied by the judiciary only three times in 76 years cannot possibly have had any meaningful, or even noticeable, effect on agency operations.

Respondents also cite (Br. 67-69 nn.47-48) a number of BIA decisions in which the Board assumed for the sake of argument that the exclusionary rule might be applicable to deportation proceedings (but see *Matter of Sandoval*, 17 I. & N. Dec. at 75 n.7 (J.A. 170)), but declined to apply the rule, because it either found no Fourth Amendment violation or concluded that there was independent, untainted evidence of deportability sufficient to uphold the deportation order.⁵ Significantly, respond-

⁵ Not a single one of the cases cited by respondents in this latter category (Br. 68-69 n.48) contains a finding by the BIA of a Fourth Amendment violation. Instead, the BIA found it unnecessary in each case to determine whether there had been a Fourth Amendment violation. In *Matter of Perez-Lopez*, 14 I. & N. Dec. 79 (1972), the immigration judge had initially terminated the deportation proceeding upon finding that the evidence used to establish deportability was tainted by a Fourth Amendment violation. Thereafter, the proceeding was reopened and the alien found deportable on the basis of an anonymous tip that led INS to the same evidence in its files that previously had been suppressed. On appeal, the BIA affirmed the order of deportation and expressly noted that it was unnecessary to pass on the validity of the immigration judge's initial order terminating the proceedings (*id.* at 81).

Respondents also erroneously assert (Br. 70) that the BIA found a Fourth Amendment violation in *Matter of Sandoval*, *supra*. In fact, the Board found only that Emma Sandoval had established a *prima facie* case that would be sufficient to require the Service to justify its actions or demonstrate that any taint was too attenuated to require suppression (17 I. & N. Dec. at 73-74 (J.A. 168)). The Board's ruling on the applicability of the exclusionary rule rendered any such showing unnecessary.

ents have failed to cite a single BIA decision in which the Board actually suppressed evidence or terminated a deportation proceeding on Fourth Amendment grounds, and we are aware of no such decision.* It defies common sense to suppose that a rule that has never been applied by the agency, even if theoretically available, can have had any deterrent impact on the conduct of immigration officers. On the contrary, if immigration officers drew any conclusions about the matter at all, they almost certainly would have concluded that the threat of suppression was wholly chimerical. In these circumstances, it cannot seriously be urged that the exclusionary rule was having any deterrent impact on immigration officers prior to *Matter of Sandoval*, nor can it be contended that *Matter of Sandoval* provided any new incentives for immigration officers to violate the Fourth Amendment.

3. Respondents repeatedly assert that the exclusionary rule is essential to protect the Fourth Amendment rights of Hispanic Americans and lawfully-present aliens. But they have not responded to our argument (Pet. Br. 16-20) that this Court has not extended the rule to new categories of cases except upon finding a widespread pattern of flagrant violations that had not been corrected through reliance on less drastic remedies. As we have already noted (see pages 3-5 & notes 3-4, *supra*), respondents are unable to document their assertion of widespread

*The BIA does occasionally terminate deportation proceedings when it finds that the circumstances surrounding a particular arrest and interrogation would render use of the evidence thereby obtained fundamentally unfair, in violation of the Fifth Amendment's Due Process Clause. See Pet. Br. 41-43. But, so far as we are aware, the Board has never suppressed evidence or terminated a deportation proceeding on Fourth Amendment grounds alone.

Respondents' contention (Br. 68-69 n.48) that the unappealed and unpublished decisions of the immigration judges likely contain "numerous" instances of suppression is inherently implausible. In light of the fact that the Service has *never* lost a Fourth Amendment suppression issue before the BIA, it seems most unlikely that it would consistently decline to appeal adverse decisions by immigration judges.

Fourth Amendment violations by INS agents; indeed, their argument is contrary to the finding of the court of appeals, which conceded that "immigration officers have not committed many Fourth Amendment transgressions * * *" (Pet. App. 28a).

As noted in our opening brief, application of the exclusionary rule is particularly inappropriate in a case like Sandoval's, in which there is nothing more than a *presumed* Fourth Amendment violation, based on the agent's inability to recall the precise details of Sandoval's detention and arrest.⁷ Respondents' argument (Br. 103 & n.87) that Agent Bower lacked probable cause to arrest Sandoval is not supported by the record. It is true that Agent Bower could not recall with assurance the details of his encounter with Sandoval, but he testified that the only persons questioned were those believed to be illegal aliens (J.A. 134). Although it is somewhat unclear from Agent Bower's testimony precisely what legal standard he thought was required to question persons at the factory, it appears (J.A. 138, 140) that his general practice was to apply a standard of probable cause—clearly more than is required by either the Fourth Amendment or INS policy. Significantly, respondents do not contend that even a single one of the 37 aliens ap-

⁷ Respondents contend (Br. 101) that the government cannot be heard to complain that no Fourth Amendment violations occurred in the cases now before the Court because we did not seek review on that issue in Sandoval's case and it has yet to be determined in Lopez's case. It is of course true that, should the Court agree with the Ninth Circuit that the exclusionary rule is generally applicable to deportation proceedings, we would not be entitled to reversal on the basis of any error in that court's conclusions on the merits of the Fourth Amendment issues. But that is a far cry from saying that this Court should decide the exclusionary rule issue without considering how the rule would work in practice. For that purpose, the Court may properly examine typical deportation proceedings, including the instant cases, in order to assess our contention that there will be a relatively poor correlation between applications of the suppression remedy and actual Fourth Amendment violations.

prehended at Sandoval's place of employment turned out to be a citizen or lawfully-present alien. We doubt that the agents' apparent 100% success rate (see J.A. 129) is attributable to chance, as opposed to their careful adherence to established procedures designed to ensure only lawful arrests.

In these circumstances, respondents' reliance (Br. 1-6, 102-104) on Sandoval's testimony that he "was pulled out of line when he was in the process of entering his workplace, locked * * * in a men's restroom, and transported * * * to a police station for interrogation" (Br. 102) is wholly irrelevant.⁸ If, as may reasonably be inferred from the accuracy with which illegal aliens were arrested, Agent Bower had probable cause to arrest Sandoval, there is nothing remarkable about his having been pulled out of line and placed in a holding area until he could be transported to the police station.⁹

Because of the enforcement techniques most frequently utilized by INS agents (see Pet. Br. 32), the situation that occurred in Sandoval's case will inevitably be quite common.¹⁰ But in the absence of clear evidence that

⁸ Sandoval's testimony was never credited or relied upon by the immigration judge, the BIA, or the court of appeals.

⁹ Respondents also assert (Br. 5) that Sandoval asked for his attorney while at the police station, and suggest that he did so prior to providing the information Agent Bower used to complete the I-213. Agent Bower testified to the contrary (J.A. 143):

Q [By respondent's counsel:] Did [Sandoval] at that time indicate that he wanted to talk with me in the language some of my clients use "Abogado Charlie?"

A [Agent Bower:] No, he did not. Neither he nor his wife indicated they wished to communicate with you at that time. Agent Bower testified that it was not until he was through processing Sandoval, i.e., after he had completed the I-213, that Sandoval indicated his desire to talk to an attorney to arrange bond and to take care of his wife and baby (J.A. 143).

¹⁰ See, e.g., *INS v. Olivas-Monorrez*, petition for cert. pending, No. 83-1535. In that case, the Border Patrol Agent who made the arrest could not recall exact details, but he testified that his cus-

Fourth Amendment violations actually are occurring in such situations, the Court must take into account the relatively low correlation that can be expected between application of the suppression remedy and actual Fourth Amendment violations.¹¹ This is particularly so in light of INS's voluntary abandonment of the enforcement practices that may have offered the greatest potential for Fourth Amendment violations and that appear to be most troubling to respondents' counsel. See, e.g., Br. 93. For example, residential searches have been restricted to searches authorized by warrant or routine casework, i.e., searches for aliens who fail to appear for scheduled hearings. See Memorandum from Benjamin R. Civiletti to David Crosland, *INS Search Policy* (January 13, 1981). (A copy of this memorandum has been lodged with the Court and served on respondents' counsel.) INS advises us that it also has abandoned "Area Control" operations (cf. *Marquez v. Kiley*, 436 F. Supp. 100 (S.D.N.Y. 1977)), except to the extent that such operations are carried out incident to enforcement at places of employment. In other words, random patrols of non-border areas known to be frequented by illegal aliens are no longer conducted.

tomary procedure was not to stop anyone for questioning in the absence of articulable facts that would lead to the belief that the person stopped was probably an alien. He also testified that the arrest was part of a six-day operation in which six Border Patrol Agents had apprehended approximately 280 undocumented Mexican aliens. On the particular day that Olivas-Monorrez was arrested, the arresting agent and his colleagues already had gone to several different ranches and they "had cars and people running and going in different directions" (A.R. 32). (We have furnished respondents' counsel with a copy of our petition in *Olivas-Monorrez*.)

¹¹ In Lopez's case, the Fourth Amendment issue has not yet been decided. Nevertheless, we think it clear that no violation occurred. Respondents' argument (Br. 105-106 & n.90) that Lopez had a legitimate expectation of privacy in the transmission repair shop where he worked is inherently implausible. See, e.g., *Babula v. INS*, 665 F.2d 293, 297 (3d Cir. 1981). (Contrary to respondents' argument (Br. 105 n.90), *Steagald v. United States*, 451 U.S. 204, 208-211 (1981), in no way forecloses us from bringing the facts of

4. Despite their repeated assertions that the exclusionary rule is "the only effective device for enforcing the Fourth Amendment in the immigration context" (Br. 18-19; see also Br. 28, 35-36, 40), respondents have wholly failed to offer any rationale to support their assumption that the rule would in fact be an effective deterrent in this context. Respondents have done no better than the court of appeals; they assert (Br. 38-43) that deportation proceedings are within immigration officers' "zone of primary interest" and that illegal evidence obtained by immigration officers for use in deportation proceedings is an "intra-agency" violation. Even if both propositions are conceded, they are merely the beginning of the analysis, not the end.

As we discussed in our opening brief (at 37-39), the assumption that the exclusionary rule will exert a meaningful deterrent impact on immigration officers is in-

Lopez's case to the Court's attention, nor would it prevent the government from pressing its standing argument in the event of a remand.) Respondents also argue (Br. 105-106) that the agents had Lopez's name prior to entering the transmission shop and that they therefore should have obtained a warrant for his arrest. Respondents' version of the facts is based on counsel's offer of proof (J.A. 71-73) and is contrary to the agents' testimony (J.A. 15-49). Even if respondents' version were correct, however, it is irrelevant to the existence of a Fourth Amendment violation. Assuming, *arguendo*, that the agents had Lopez's name in advance, they could not have secured an arrest warrant based on that fact alone; probable cause to justify an arrest developed only after Lopez was questioned and voluntarily admitted his illegal alienage. At that point, the agents concluded, based on Lopez's lack of ties to this country, that he was likely to abscond before they could obtain a warrant. On the government's version of the facts, there likewise was no basis for securing a warrant in advance, since the agents testified that they had no prior knowledge of Lopez. Contrary to respondents' argument (Br. 106), however, there was no illegality because there was no "investigatory stop" (*ibid.*) that required suspicion of illegal alienage. One of the agents merely engaged Lopez in brief, non-detentive questioning, in response to which he voluntarily admitted his unlawful presence.

tuitively implausible.¹² Respondents implicitly concede as much when they assert that “[s]trong systemic incentives presently encourage INS agents to focus on the quantity of apprehensions rather than their quality under constitutional standards” (Br. 39-40). While we dispute the charge that INS agents are indifferent to constitutional standards, it seems clear that the volume of arrests made by each immigration officer renders the potential effectiveness of the suppression sanction tenuous indeed. And if further support is needed for the behavioral assumptions noted in our opening brief, it is surely provided by respondents’ complete inability to demonstrate any decline in INS’s adherence to Fourth Amendment requirements in the post-*Matter of Sandoval* period. See pages 3-4, *supra*.

5. If, as we have previously demonstrated, there is no reason to believe that the exclusionary rule will exert a meaningful deterrent impact on the conduct of INS agents, there is no justification for applying it, regardless of how one views the costs. But we note briefly that respondents seriously underestimate the costs actually involved.

First, respondents contend (Br. 79-83) that the cost of letting illegal aliens remain in this country is insignificant and can in any event be minimized by having INS proceed against the same aliens using untainted evidence.

¹² Respondents argue that we have asked the Court to “plac[e] on Respondents the burden of *empirically* proving the beneficial effects of applying the [exclusionary] sanction in deportation proceedings” (Br. 44 (emphasis added)). Since we readily acknowledged the absence of any empirical data on the effectiveness of the exclusionary rule (Pet. Br. 14), it is not surprising that respondents fail to offer any citation to our brief in support of their assertion. We do not expect respondents to come forward with nonexistent empirical data in support of the rule any more than we ourselves can provide empirical data disproving its effectiveness. Respondents do, however, legitimately carry the burden of demonstrating some reasoned basis for accepting the plausibility of the deterrence hypothesis in this context, an effort they have not even attempted.

Respondents ignore the fact that in the vast majority of cases INS has no records, and hence no independent evidence, because the aliens have entered without inspection. By contrast, virtually all of the cases cited by respondents (Br. 68 n.48) involved alien crewmen who overstayed their landing permits and who thus could be linked to records already in the agency's files. When no such records exist, however, the problems confronting INS at any subsequent deportation proceeding will often be insurmountable, particularly as illegal aliens increasingly refuse, on the advice of counsel, to answer any questions at their deportation hearings.

Second, respondents downplay the significant impact on the immigration litigation system of the court of appeals' ruling. It is true that the immigration judges and the BIA have on occasion considered suppression motions in the past, but the handful of cases cited by respondents, and their complete lack of success, demonstrate that suppression issues simply have not played a major role in deportation hearings. By contrast, the Ninth Circuit's ruling inevitably will cause a substantial increase in the number of such motions filed.¹³

Respondents contend (Br. 86-87) that adequate tools are available to deal summarily with frivolous suppression motions. But if an alien need only allege facts similar to those alleged in respondents' cases in order to raise a colorable suppression issue, it is obvious that the threshold is so low that virtually every alien could meet it. The alien need rely only on the likelihood that INS would be

¹³ We noted in our opening brief (at 29-30 & n.19) that such a trend was already noticeable. Respondents are critical of our reliance on matters not in the record before the court of appeals, but we do not believe it is improper to advise the Court of the effect of the court of appeals' decision. Obviously, this material could not have been presented to the court of appeals. Moreover, we readily acknowledged that the figures noted in our brief were estimates and that complete accuracy was not possible. Nevertheless, a discernible trend is apparent, and the Court should be aware of it in its consideration of this case.

unable to refute his claim because the volume of enforcement encounters makes it difficult for agents to recall the details of each arrest. Under these circumstances, there is no reason (other than the inability of many illegal aliens to secure legal advice) not to file a suppression motion in most cases.

The substantial systemic costs that would flow from such a radical change in the deportation system are obvious. As the BIA recognized, "[t]he ensuing delays and inordinant [sic] amount of time spent on such cases at all levels has an adverse impact on the effective administration of the immigration laws, which to date (in view of the virtual absence of cases in which evidence has been ultimately excluded) has in no way been counterbalanced by any apparent productive result" (*Matter of Sandoval*, 17 I. & N. Dec. at 80 (J.A. 177)). Respondents have not demonstrated any basis for rejecting the BIA's conclusion.

6. Respondents contend that existing alternatives to the exclusionary rule, such as internal discipline, *Bivens* suits, and actions for declaratory or injunctive relief, are not "adequate safeguards against the overzealous conduct of INS officers" (Br. 46-47). The pertinent question, of course, is whether the addition of the exclusionary rule would materially enhance the lawfulness of INS's activities. In our submission, it would not. Moreover, the alternative remedies rejected by the court of appeals, even if not wholly effective, almost surely are *more effective* than the exclusionary rule would be.

a. Respondents assert that "there are nearly insurmountable standing and equitable prerequisites which render injunctive relief extremely difficult to obtain" (Br. 48-49). While it is true that such actions require a proper plaintiff,¹⁴ the obstacles are not nearly as formid-

¹⁴ Respondents' concern that potential plaintiffs would lack standing to bring such actions appears exaggerated, at least in a case such as *Sandoval's*. The same question arose during oral argument in *INS v. Delgado*, No. 82-1271 (argued Jan. 11, 1984). Government

able as respondents contend. Indeed, it is particularly ironic that *every* example of a successful challenge to an INS enforcement practice cited by respondents (Br. 30-31 n.9) arose in the context of an action for damages or declaratory and injunctive relief. Respondents are unable to offer even a *single* example of a policy change brought about as a result of the application of the exclusionary rule. Thus, if one were to accept respondents' view that the suppression remedy was actively applied in the pre-*Matter of Sandoval* period (see page 6, *supra*), then all respondents have managed to demonstrate is that it is a far more feeble tool than civil actions for declaratory or injunctive relief. In short, it is clear from respondents' own citations that civil actions have played an important role in policing INS search and seizure activities.¹⁵

b. Respondents also argue (Br. 51-54) that *Bivens* actions are an ineffective remedy, primarily because they

counsel was asked whether the factory employees in that case had standing in light of the Court's decision in *City of Los Angeles v. Lyons*, No. 81-1064 (Apr. 20, 1983). He responded that they did because of the likelihood that similar surveys would be conducted again at the same factories. Tr. of Oral Arg. 5, 61-62. Here, too, the record reflects that INS agents had been to Sandoval's place of employment in the past (J.A. 128), and, given the effectiveness of the surveys as an enforcement technique, there is every reason to believe that they will be repeated at factories known to employ significant numbers of illegal aliens.

Apart from standing, there may well be a question concerning the propriety of injunctive relief. Ordinarily, a law enforcement agency does not have to be enjoined in order to obtain its compliance with the law, and thus declaratory relief will usually suffice. Cf. *Marquez v. Kiley*, 436 F. Supp. 100, 114 (S.D.N.Y. 1977). Notably, respondents do not even address the availability of declaratory relief.

¹⁵ Respondents complain (Br. 50) that injunctive relief "can be obtained only after the deterrence mechanism has failed." But the need to invoke the exclusionary rule in any particular case likewise means that the deterrence mechanism has failed.

rarely succeed.¹⁶ Respondents complain that *Harlow v. Fitzgerald*, 457 U.S. 800, 818 (1982), shields INS agents from liability "insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." But application of the exclusionary rule to such cases would be equally inappropriate. See generally, Brief for the United States, *United States v. Leon*, cert. granted, No. 82-1771 (argued Jan. 17, 1984).

Moreover, as we noted in our opening brief (at 48), *Bivens* actions need not be successful to exert a deterrent effect. Respondents dismiss this suggestion as "hollow" (Br. 53), but they offer no support for their position. This Court recognized the validity of the point respondents so cavalierly dismiss in *Carlson v. Green*, 446 U.S. 14, 21 (1980) (footnote omitted (emphasis added)), noting that "[i]t is almost axiomatic that the threat of damages has a deterrent effect." INS officially recognizes the same point through its policy of intentionally erring on the conservative side of close constitutional questions (*INS Handbook* iv):

If our policy is somewhat more restrictive than the Constitutional limit, * * * our officers are less likely to be involved in litigation over alleged violations of persons' Constitutional rights (*Bivens* suits). Also,

¹⁶ Respondents also complain that a potential *Bivens* plaintiff (1) must be aware that the INS agent's conduct was unlawful and (2) must then be able to find a lawyer to take his case, pay for it, and endure protracted proceedings. The first requirement hardly seems onerous; if a person is not even aware that the agent's conduct was unlawful, it seems doubtful that he has suffered any serious injury. As for the second "obstacle," the Court may take judicial notice of the fact that there is no shortage of lawyers willing to handle *Bivens* suits or to represent persons such as respondents, as evidenced by their counsel in this case. Finally, the costs of litigation and the length of the proceedings are inevitable costs associated with our entire judicial system, and they would likewise be incurred by a person invoking the exclusionary rule as a defense to the Service's attempts to deport him.

such suits are less likely to be brought, saving the Department, the agency, and the individual employee the expense, time, and anguish which such litigation entails.

Finally, respondents contend (Br. 54) that *Bivens* actions "fail to provide INS with effective incentives to adopt general policies and procedures designed to conform officers' practices to constitutional requirements." This assertion is wholly unsubstantiated, and it is contrary to this Court's observation in *Carlson v. Green*, 446 U.S. at 21, that "responsible superiors are motivated not only by concern for the public fisc but also by concern for the Government's integrity." Moreover, the government already "pays" for its officers' alleged misconduct by defending *Bivens* suits, and the Administration is supporting legislation to substitute the United States as the defendant in *Bivens*-type actions. See, e.g., S. 829, 98th Cong., 1st Sess. (1983). Again, therefore, the potential for *Bivens* actions, whether successful or not, is at least as likely to deter unlawful conduct by INS agents as is the exclusionary rule.

c. Relying primarily on a 1980 report (U.S. Comm'n on Civil Rights, *The Tarnished Golden Door: Civil Rights Issues in Immigration* [hereinafter cited as *The Tarnished Golden Door*]), respondents criticize (Br. 54-61) INS's internal disciplinary program as inadequate. Most of the criticism, however, is both insubstantial¹⁷ and obsolete. At approximately the same time that *The Tarnished Golden Door* was published, INS was voluntarily instituting a complete restructuring of its internal

¹⁷ Repeatedly, *The Tarnished Golden Door* adverts to various deficiencies in INS's internal disciplinary program and then observes in footnotes that INS in fact was doing precisely what the Civil Rights Commission believed should be done, but that it had not incorporated those practices into its official Operations Instructions. See, e.g., *id.* at 123 & nn.52, 57, 125 & nn.73, 75. We do not view this excessive concern with form over substance as indicative of serious problems requiring correction.

disciplinary program in response to deficiencies found not by the Civil Rights Commission but by an internal Department of Justice audit. The first and perhaps most significant change was the hiring of a new director for INS's Office of Professional Responsibility. As described in one of respondents' sources that is otherwise quite critical of INS (J. Crewdson, *The Tarnished Door: The New Immigrants and the Transformation of America* 212 (1983)), the agency "recruited a tough New York City police inspector named Walter Connery to run [the OPR]. That Connery was serious about his job quickly became evident * * *." ¹⁸

As a result, many of the deficiencies cited by respondents no longer exist. For example, complainants are routinely notified of the disposition of their complaints, a "Case Factor Solvability System" has been designed and implemented to provide clear guidance to investigators on the standards to be applied in closing or continuing investigations, and the files of closed cases are now (and have been since 1980) permanently retained.¹⁹ In addition, more changes of the type desired by respondents are in the planning stages. For example, pre-addressed, postage prepaid, Spanish/English complaint "postcards" have been prepared (a sample is being lodged with the Court and served on respondents' counsel) to

¹⁸ Prior to joining INS, Connery was the commanding officer in charge of internal discipline for the New York City Police Department.

¹⁹ These changes and others are set forth in Office of Professional Responsibility, INS, U.S. Dep't of Justice, *Investigators Manual* (Jan. 1984). We are lodging a copy of the *Investigators Manual* with the Court and furnishing one to respondents' counsel. Although the manual was only recently completed, many of the procedures described therein have been in effect since 1980. To the extent that the *Investigators Manual* specifies procedures different from those contained in INS's Operations Instructions (which are undergoing revision in consultation with the unions representing INS employees), INS considers the *Investigators Manual* to control.

simplify as much as possible the process for filing complaints, and the OPR is now considering various means for increasing public awareness of the complaint process. In addition, records of complaints and investigations are being computerized so that effective monitoring will be greatly enhanced.

Respondents complain (Br. 58) that INS keeps no records on the number of complaints or disciplinary actions involving Fourth Amendment violations by INS officers. It is true that such complaints are not separately tracked, but we are advised by INS that complaints involving "pure" Fourth Amendment violations are relatively rare. Instead, such complaints are generally inextricably interwoven with complaints falling in the broad category of "civil rights" violations. These complaints are thoroughly investigated and, as we noted in our opening brief, appropriate disciplinary action is taken.²⁰

For the foregoing reasons, and the reasons set forth in our opening brief, the judgments of the court of appeals should be reversed.

Respectfully submitted.

REX E. LEE
Solicitor General

APRIL 1984

²⁰ Respondents contend that INS's internal disciplinary program is inadequate in part because it has not stopped "even the most flagrant corruption and brutality" (Br. 55). This is somewhat like saying that the criminal laws should be abandoned because they fail to stop crime. What is important is that INS responds to these incidents with appropriate action, ranging from administrative sanctions to criminal prosecutions.

No. 83-491-CFX
Status: GRANTED

Title: Immigration and Naturalization Service, Petitioner
v.
Adan Lopez-Mendoza
and
Immigration and Naturalization Service, Petitioner
v.
Elias Sandoval-Sanchez

Docketed:
September 22, 1983

Court: United States Court of Appeals
for the Ninth Circuit

Counsel for petitioner: Solicitor General

Counsel for respondent: Heen, Mary L., Huerta, John E.

| Entry | Date | Note | Proceedings and Orders |
|-------|-------------|------|---|
| 1 | Jul 14 1983 | | Application for extension of time to file petition and order granting same until September 22, 1983 (Rehnquist, July 15, 1983). |
| 2 | Sep 22 1983 | G | Petition for writ of certiorari filed. |
| 4 | Sep 30 1983 | | Order extending time to file response to petition until November 26, 1983. |
| 5 | Nov 28 1983 | | Brief of respondents Adan Lopez-Mendoza, et al. in opposition filed. |
| 6 | Nov 30 1983 | | DISTRIBUTED. January 6, 1984 |
| 7 | Jan 9 1984 | | Petition GRANTED. ***** |
| 8 | Feb 23 1984 | | Joint appendix filed. |
| 9 | Feb 23 1984 | | Application for leave to exceed the page limits on petitioner's brief on the merits filed with WHR (A-678). |
| 10 | Feb 27 1984 | | Order denying same by Rehnquist, J. |
| 11 | Feb 27 1984 | | Application for reconsideration of order denying application for leave to file petitioner's brief on the merits in excess of page limitations filed with Rehnquist, J., and order denying same 2/28/84. |
| 12 | Feb 27 1984 | | Record filed. |
| 13 | Feb 29 1984 | | Certified original record & C.A. proceedings, 3 volumes, received. |
| 14 | Feb 29 1984 | | Order extending time to file brief of respondent on the merits until March 30, 1984. |
| 16 | Mar 2 1984 | | Brief of petitioner Immigration and Naturalization Service filed. |
| 17 | Mar 2 1984 | | SET FOR ARGUMENT. Wednesday, April 18, 1984. (1st case) |
| 18 | Mar 20 1984 | | Brief of respondents Adan Lopez-Mendoza, et al. filed. |
| 19 | Apr 3 1984 | | CIRCULATED. |
| 20 | Apr 5 1984 | | Lodging received from the Solicitor General. (Manual). |
| 21 | Apr 11 1984 | | X Reply brief of petitioner INS filed. |
| 22 | Apr 11 1984 | | ARGUED. |
| 23 | Apr 18 1984 | | |